UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ONE JOURNAL SQUARE PARTNERS URBAN RENEWAL COMPANY LLC, ONE JOURNAL SQUARE TOWER NORTH URBAN RENEWAL COMPANY LLC, and ONE JOURNAL SQUARE TOWER SOUTH URBAN RENEWAL COMPANY LLC, Plaintiffs, v. JERSEY CITY REDEVELOPMENT AGENCY, CITY OF JERSEY CITY, and STEVEN FULOP, Defendants.	:	Civil Action No. 2:18-cv-11148 (JMV) (JBC)

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

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PRELIMINARY STATEMENT

This matter arises from actions of the Defendants who have violated Plaintiffs' constitutional rights and engaged in a breach of contract, breach of the covenant of good faith and fair dealing, and various other wrongful conduct arising out of Defendants' wrongful attempts to interfere with the project located at One Journal Square in Jersey City, New Jersey (the "Project"). As pleaded in the Complaint, after Plaintiffs expended approximately $55 million in application and development costs, Defendants, on April 17, 2018, caused to be issued a letter falsely claiming that Plaintiffs had defaulted in their obligations under a certain Redevelopment Agreement (the "Notice" or "Notice of Default"). The issuance of the Notice was motivated solely by political animus against Kushner Companies LLC, an investor in Plaintiffs, which was formerly run by Jared Kushner, currently Senior Advisor to President Donald J. Trump. As alleged in the Complaint, the Notice was fabricated to appease and curry favor with the overwhelmingly anti-Trump constituents of Jersey City, and was orchestrated by Mayor Steven Fulop and the JCRA and the City of Jersey City, both of which he controls, representing a repudiation of the long course of dealing between the parties under the Agreement. The Notice also reflects Defendants' political animus towards President Trump and Kushner and, as alleged in detail in the Complaint, constitutes little more than a transparent attempt to interfere with Plaintiffs constitutional rights in violation of 42 U.S.C. § 1983.

Defendants' motions to dismiss are both factually and legally flawed. *First*, they completely ignore settled jurisprudence governing motions to dismiss by refusing to accept the well-pleaded facts and the detailed Amended Complaint consisting of 126 separate paragraphs of predicate facts. Rather than accepting those facts as true, and giving the non-moving party the

benefit of all reasonable inferences flowing therefrom, many of their arguments ignore the applicable standard of review and they simply contest Plaintiffs' factual assertions.

Second, with respect to Plaintiffs' § 1983 claim, as set forth in detail below, Defendants' legal arguments lack merit. They inexplicably claim that the loss of a $900 million project and $55 million already spent is not a protectable "property interest." They similarly claim that Plaintiffs lack "standing" to assert claims for the substantial direct damages they have suffered as a result of the wrongful conduct. Incredibly, they claim that a government official alleged to have abused his power by fabricating a Notice of Default in order to benefit himself politically and cause harm to political opponents has not engaged in conduct which would be shocking to any fair minded person.

Although the JCRA has not moved to dismiss counts for breach of contract and related claims, the other Defendants have done so. However, as set forth in detail below, the Complaint properly sets forth viable causes of action for breach of contract, breach of the covenant of good faith and fair dealing, and tortious interference with contractual relationships.

The facts of this case present a disturbing pattern of misconduct by public officials for personal political gain at the expense of the public's right to have a blighted area of downtown Jersey City revitalized. While the issues are certainly important to the parties before the Court, this case has implications far beyond the parties. The parties' right to enter into a contract, to order their affairs, is the foundation of our economic system. This case will answer the question of whether we will allow the politics of the moment to be used as a vehicle to destroy contractual rights and property rights of those with whom we disagree.

STATEMENT OF FACTS

A. History of the Project

Since 1974, the Journal Square area has been designated by the City Council of Jersey City ("City Council") as an "area in need of rehabilitation." (Compl. ¶ 12.[1]) This blighted area includes the One Journal Square property that is the subject of this litigation (the "Project Premises"). Plaintiffs One Journal Square Partners Urban Renewal Company LLC, One Journal Square Tower North Urban Renewal Company LLC, and One Journal Square Tower South Urban Renewal Company LLC ("Plaintiffs" or "JSP") are the third developer for this Project, which began in 2006, when the City of Jersey City ("City"), through its instrumentality the Jersey City Redevelopment Agency ("JCRA"), designated Journal Square Development, LLC (the "First Designated Redeveloper") to redevelop the Project Premises. The following year, the Project was assigned to MEPT Journal Square Urban Renewal, LLC ("MEPT" or "Prior Redeveloper") with the JCRA's consent. (Compl. ¶ 13.)

B. The City and Fulop Actively Seek Redevelopment of Journal Square

In 2008, the City again designated the Project Premises as an "area in need of rehabilitation." The City subsequently adopted Ordinance No. 10-103 in 2010, which approved the Journal Square 2060 Redevelopment Plan (the "2060 Redevelopment Plan") to revitalize and re-establish Journal Square as the City's "primary central business district and activity center" to expand the City's growth beyond the waterfront.[2] (Compl. ¶¶ 15-16.)

A few years later, Fulop issued various Executive Orders to further promote development of the Journal Square area, including the Project Premises. For example, Executive Order 2013-

[1] "Compl." or "Complaint" refers to the operative Amended Complaint and Jury Demand filed on September 26, 2018.

[2] Journal Square and the Project Premises are situated toward the center of the city and are not located near the waterfront.

004 issued on December 14, 2013 provided that fewer tax abatements would be granted for waterfront development so that they could instead "be utilized to support and encourage development in other areas of the City, including but not limited to, Journal Square[.]" (Compl. ¶ 17.) Two years later, Fulop virtually codified tax incentives for Journal Square developers by *requiring* that the mayor support eligible tax abatement applications in Executive Order 2015-007, mandating that any tax abatement application that complies with City policies "*shall* receive Mayoral recommendation and should be approved by the Council." (Compl. ¶ 18 (emphasis added).)

As these various ordinances and executive orders indicate, the City's plan to revitalize the Journal Square area was to include issuance of tax abatements to attract developers and investment capital. Accordingly, the City has awarded tax abatements to many developers in the 2060 Redevelopment Plan area, including MEPT, Plaintiffs' predecessor, which received a thirty-year tax abatement for this Project on the same Project Premises in 2008. (Compl. ¶¶ 20-21.)

C. Defendants Induce JSP to Replace the Prior Redeveloper

As Defendants evidently recognized, obtaining governmental and quasi-governmental financing for projects of this size and complexity is crucial for their success. (Compl. ¶ 23.) However, during the four years that followed MEPT's acquisition of the Project in 2007, the JCRA obstructed MEPT's progress and issued a notice of default against MEPT. (Compl. ¶¶ 25-26.) As a result, MEPT threatened legal action against the JCRA, which ultimately prompted Defendants to consent to MEPT's sale of its rights to the Project to "Plaintiffs" or "JSP" on February 14, 2014 with Defendants' support. (Compl. ¶¶ 27-28.) Although Defendants were aware that Jared Kushner was the CEO of one of the JSP joint venture partners, Mr. Kushner's

father-in-law, Donald J. Trump, had not yet declared his candidacy for public office. (Compl. ¶¶ 28, 31.)

JSP and the JCRA began negotiating a Redevelopment Agreement to construct a mixed-use project, consisting of two residential towers over an approximately eleven-story base building containing approximately 160,000 square feet of retail and commercial space, a parking garage, and no more than 3,000 residential units. Over time, the site plans for the Project would change, and in its final iteration, they called for two 56-story residential towers containing 1,512 residential units above a ten-story podium, 96,000 square feet of retail space, 118,000 square feet of commercial space, amenities for residents of the towers, a landscaped plaza with an estimated cost of $10.6 million and an 864-space parking garage (the "Project" or "Project Premises"). The Project has an estimated cost of approximately $900 million and would transform and revitalize the blighted Journal Square area of Jersey City, as desired by the City ordinances and Fulop's executive orders. (*See* Compl. ¶ 1.)

Defendants induced JSP by making numerous representations, including, but not limited to promises that Defendants would work in good faith with JSP to adjust the timetable for completion of construction in a reasonable way; that Defendants would cooperate with and assist JSP in obtaining required Governmental Approvals; that the Project had received, and the City had issued, tax abatements to the Prior Redeveloper and for other projects in the Journal Square area; and that Defendants would cooperate with and assist JSP in obtaining similar non-governmental financing needed for the Project, including tax abatements from the City. Defendants further indicated that JSP would need to make a $2.5 million contribution to rehabilitate Loew's Theatre in Journal Square in order to be designated as the redeveloper for this site. (Compl. ¶ 30.)

D. The Redevelopment Agreement

After numerous discussions, JSP and the JCRA executed the Redevelopment Agreement on April 21, 2015. (Compl. ¶ 32.) The JCRA, in negotiating and executing the Redevelopment Agreement, acted as "an instrumentality of the City of Jersey City," as expressly set forth in the Redevelopment Agreement. (Compl. ¶ 33.) Mayor Fulop appointed the members of the JCRA and controls its actions, including the negotiation and final policy-making authority over the Redevelopment Agreement and the JCRA's performance thereunder. (Compl. ¶ 33.)

The Redevelopment Agreement included robust contractual provisions to ensure flexibility in performance, required cooperation and good faith dealing between the parties, and required adjustments to the timetables for approvals, financing, and construction as necessary. (Compl. ¶ 34.) All parties recognized that such flexibility was needed due to uncertainties in obtaining the necessary Government Approvals, which include planning board approval, among other things. (Compl. ¶¶ 34-35.) The Redevelopment Agreement includes provisions requiring the JCRA to "cooperate and assist" JSP in obtaining Governmental Approvals and financing. (Compl. ¶ 36, Exh. A §3.01.)

The parties also understood that the Project would require both conventional financing as well as government funding through a long-term tax abatements from the City via a payment in lieu of taxes ("PILOT") and the issuance of Redevelopment Area Bonds ("RABs") by the City. (Compl. ¶ 37.) For example, the Redevelopment Agreement states in § 4.01(b) that JSP's obligations under the contract were "subject to the Redeveloper . . . (ii) receiving approval of a long term tax exemption from the City for the Project; [and] (iii) obtaining approval for the issuance of Redevelopment Area Bonds from the City and the Local Finance Board . . . ." (Compl. ¶ 40.) Section 4.02 of the Redevelopment Agreement also obligates the JCRA and the

City to "cooperate in the processing of governmental and quasi-governmental funding applications from sources other than Financial Institutions for financing any part of the Project." (Compl. ¶ 41.)

The Redevelopment Agreement included various good faith provisions to induce JSP and provide the necessary flexibility required for the Project. For example, extensions to the "Construction Timetable" "shall not be unreasonably denied, delayed or withheld" by the JCRA. (Compl. ¶¶ 42-43, Exh. A at § 2.10, Schedule C-1.)

While the Redevelopment Plan set January 1, 2017 as the construction commencement deadline, it also contained an "Initial Contingency Period" to satisfy "Redeveloper Contingencies" of 180 days after "non-appealable Preliminary and Final Major site plan approval." (Compl. ¶ 44, Exh. A at Schedule C-1.) These "Redeveloper Contingencies" include financing, approval of a long-term tax exemption from the City, and issuance of RABs by the City. If the Redeveloper Contingencies are not satisfied within the Initial Contingency Period, § 4.01(b) provides that the Initial Contingency Period automatically extends for a period of ninety business days. (Compl. ¶ 45, Exh. A at § 4.01(b).) According to these terms, the Initial Contingency Period does not commence, subject to any extensions (with the JCRA's consent to any such extensions not to be unreasonably withheld), until the final approval of the Project site plan.

E. The Port Authority and FAA Delay Approval of JSP's Site Plan

Final site plan approval took longer than anticipated due to factors beyond JSP's control. For example, an objection from the Federal Aviation Administration ("FAA") to the height of one of the towers in May 2017 and objections made by the Port Authority of New York and New Jersey ("Port Authority") regarding setback lines during 2017 required submission of an

amended site plan in August 2017. (Compl. ¶ 47.) The City supported these amended site plans at the time they were made, despite being after the January 1, 2017 construction commencement date in the Redevelopment Agreement. (Compl. ¶¶ 47, 56.)

The Jersey City Planning Board unanimously approved the amended site plan on November 14, 2017. (Compl. ¶ 47.) The Hudson County Planning Board subsequently gave final approval to the site plan (the "Final Planning Board Approval") on February 20, 2018. (Compl. ¶ 47.)

These planning board approvals extended subsequent timing for various milestones. According to the terms of the Redevelopment Agreement, the appeal period runs 45 days from the date of the Final Planning Board Approval on February 20, 2018, *i.e.*, until April 6, 2018. (Compl. ¶ 48.) The Initial Contingency Period is subject to a further extension of ninety business days pursuant to § 4.01(b). Therefore, the Initial Contingency Period expires, at the earliest, on February 14, 2019 – a date that has not yet arrived. (Compl. ¶ 48.)

F. JSP Satisfies Its Obligations to Fund Loew's Theatre

As previously indicated, the City required JSP to fund Loew's Theatre as part of the developer designation process. In April 2015, substantially contemporaneous with the execution of the Redevelopment Agreement, JSP and the JCRA also executed a Pledge Agreement, pursuant to which JSP was required to contribute $2.5 million to the renovation of the Loew's Theatre in Journal Square. The payment consisted of a $500,000 non-refundable cash contribution and a $2 million irrevocable letter of credit payable to the JCRA. (Compl. ¶ 49.) The Pledge Agreement was subsequently amended on February 14, 2017 to divert the $2.5 million to the "Journal Square Arts Initiative" at the City's request. (Compl. ¶ 79.) The Pledge Agreement is only one small part of JSP's fulfillment of its obligations. Since the execution of

the Redevelopment Agreement, JSP has expended over $55 million in application and redevelopment costs to perform its obligations under the Agreement. (Compl. ¶ 59.) The same cannot be said of Defendants.

G. Defendants Seek to Terminate JSP for Political Reasons by Issuing a Baseless Notice of Default

Beginning in the 2016 election cycle, certain high-profile executives and shareholders of JSP became active in Republican presidential politics. Jared Kushner, then-CEO of the Kushner Companies, served as an advisor to then-candidate Donald J. Trump, and Charles Kushner held an event at his home for the Trump Campaign. (Compl. ¶¶ 60-61.)

On November 8, 2016, Mr. Trump was elected president of the United States, in what many considered to be an unexpected victory. (Compl. ¶ 62.) Jersey City voters overwhelmingly voted against Mr. Trump in the election. (Compl. ¶ 93.) On January 9, 2017, Jared Kushner was named a senior advisor to President-Elect Trump. (Compl. ¶ 63.) President-Elect Trump was sworn into office on January 20, 2017. (Compl. ¶ 64.) Soon thereafter, Deputy Mayor Marcos Vigil advised JSP that, for political reasons, JSP should submit its application for tax abatements by April or May or should wait until after the Jersey City elections for mayor and the City Council were held in November 2017. (Compl. ¶ 69.) In accordance with the Deputy Mayor's advice, and in an effort to continue to expedite progress on the Project, JSP submitted an application for a PILOT and RABs on April 18, 2017, during the earlier of the two options presented by the Deputy Mayor. (Compl. ¶ 70.)

On May 6, 2017, representatives of JSP gave a presentation in China to potential investors in the Project, during which Nicole Meyer-Kushner (Jared Kushner's sister) made comments about the Project. The presentation prompted substantial press coverage in the United

States media concerning Meyer-Kushner's comments, including the *New York Times*. (Compl. ¶ 71.)

The next day, Fulop began criticizing JSP's tax abatement request in an effort to curry favor with the decidedly anti-Trump sentiment of the Jersey City electorate as part of his 2017 re-election campaign. On May 7, 2017, Fulop, commented on Facebook that "the City is not supportive of [JSP's] request and while the law requires a first reading ordinance vote, if they submit an application I don't see the council voting in favor. . . ." (Compl. ¶ 72.) Thereafter, JSP was advised by City officials that "it's not a good time" for them to deal with the tax abatement application and requested that JSP hold the application back until the elections were over in November. Upon repeated assurances from various City officials that a resubmitted application would receive fair consideration and that "reasonable adjustments" would be made to the construction timetable, JSP acquiesced and withdrew its application. (Compl. ¶¶ 74-75.)

Throughout 2017, several draft agreements were circulated to memorialize the extensions necessitated by events beyond JSP's control. (Compl. ¶ 77.) The parties then scheduled a meeting to discuss the Amended and Restated Redevelopment Agreement to be held on September 8, 2017. (Compl. ¶ 81.) However, on September 7, the JCRA cancelled that meeting and unilaterally cut off further communications. (Compl. ¶ 82.)

At no point during 2017, however, did Defendants suggest that JSP was in default of its obligations under the Redevelopment Agreement. To the contrary, Defendants' representatives' appeared before the Jersey City Planning Board to support the amended site plan application, even on November 14, 2017—seven days after Fulop's re-election. (Compl. ¶¶ 47, 56.)

On January 10, 2018, during a private meeting at his office, Fulop confirmed that the true motive in denying tax abatements for the Project, despite awarding them to the Prior

Redeveloper, and the Redevelopment Agreement contemplating their issuance, was the involvement of the Kushner family, stating that it was "really tough" to move forward with the deal, and that the problem would go away if the Kushners left the deal and a new partner was brought in. (Compl. ¶ 88.) Fulop also stated at the meeting that it would be "blatant discrimination" against JSP to deny tax abatements for the Project, considering that tax abatements were awarded to the Prior Redeveloper, to other developers in the city, and were contemplated by the Agreement. (Compl. ¶ 88.)

Fulop publicly acknowledged the City's political animus against the Kushners on several occasions. On January 24, 2018, Fulop tweeted a link to a Bloomberg article about the project stating, "I think our office/comment is 100% clear in the story. Our position has NOT changed + we don't see support for incentives or abatements from the city for this project. . . . I suspect it's DOA." Fulop repeated his "DOA" admonition to the public and City officials in a second tweet on February 20, 2018. (Compl. ¶¶ 92-93.)

Fulop's attacks on JSP and the Kushner family continued for months. On April 17, 2018, he tweeted that there is a "sense of entitlement that the developer has towards a subsidy" – ignoring the fact that it was always part of the financing package which he was contractually required to support. (Compl. ¶ 94.) Fulop's public representations were the opposite of what he told JSP privately, namely that he would support tax abatements, that they were called for under the Redevelopment Agreement, and that the failure to give such abatements to JSP would be discriminatory because other similarly situated developers received them. (Compl. ¶¶ 88, 94.)

In an effort to move the Project forward despite Fulop's public attacks and the JCRA's and the City's lack of responsiveness, JSP submitted an executed version of the Amended and Restated Redevelopment Agreement to the JCRA and another tax abatement application to Fulop

on April 6, 2018. (Compl. ¶ 95.) Fulop refused to submit the application to the City Council (despite his statutory obligation to do so) and the JCRA refused to sign the Amended and Restated Redevelopment Agreement. (Compl. ¶¶ 96-97.) Instead, the JCRA issued the Notice of Default on April 17, 2018, which alleged for the first time that JSP was in default because construction had not commenced by January 1, 2017 – more than 15 months earlier! (Compl. ¶¶ 96, 98.)

The Notice of Default alleges that JSP defaulted under the Redevelopment Agreement by failing to: (1) mobilize and commence construction of Phase I of the Project on or before January 1, 2017, as set forth in the Construction Timetable on Schedule C-1; (2) submit evidence to the JCRA of firm commitments for financing and equity capital necessary to construct the Project within the Initial Contingency Period and any extensions thereof; and (3) obtain or waive the Redeveloper Contingencies within the Initial Contingency Period and any extensions thereof. (Compl. ¶ 99.) Under the Redevelopment Agreement, however, JSP has until 2019 to waive or satisfy the Redeveloper Contingencies and submit construction drawings. (Compl. ¶¶ 101-103.)

The JCRA's issuance of the Notice of Default triggered JSP's lender to serve JSP with its own notice of default on a $57 million bridge loan needed to support the Project. (Compl. ¶ 115.) The JCRA's Notice of Default therefore completely obstructed further progress on the Project. (Compl. ¶ 117.)

H. Defendants' Political Animus Continues

Despite the fact that the Notice of Default was premature under even the existing Redevelopment Agreement, Fulop continued to advocate removal of the Kushners from the Project. For example, on April 18, 2017, Fulop tweeted that "Last night the Jersey City Redevelopment Agency defaulted Kushner/KABR on their Redeveloper Agreement w/#Jersey

City - it's important as we're tired of the delays - hopefully this will now move to a different partner that can complete the project." (Compl. ¶ 118)

After spending more than $55 million on this Project and attempting for months in vain to communicate in good faith with Defendants, JSP was left with no other choice but to file this action on June 27, 2018 against Defendants for breach of contract, violation of its constitutional rights under 42 U.S.C. § 1983, and various other counts. (Compl. ¶ 119.) JSP also timely filed a notice of claim against Defendants in accordance with the New Jersey Tort Claims Act on July 16, 2018. (Compl. ¶ 126.)

Yet Fulop's political animus continued even after commencement of this litigation. On the same day the Complaint was filed, Fulop falsely tweeted about the Kushners: "Bottom line: the same way they illegally try to use the presidency to make $ when it suits them is the same way here where they try to use the presidency to be pretend victims when that suits them. Lawsuit = they will say/do anything to make $." (Compl. ¶ 119.) This false statement by Fulop prompted the Kushner Companies to send a cease and desist letter to Fulop on June 28, 2018 cautioning him against making further defamatory remarks. (Compl. ¶ 121.)

The following day, Fulop posted the cease and desist letter to Twitter stating: "Whether it's inaccurately reporting ownership in properties, or misrepresenting $ partners, or outright saying in China that $ in Jersey City properties means lots to the family, I think the public can judge 4 themselves[.]" (Compl. ¶ 121.)

Fulop also began making public statements suggesting there should be a shift in the City's tax abatement policies to transparently manufacture a pretextual defense to this litigation. For example, on July 17, 2018, Fulop tweeted that the City had not "considered any market rate tax abatements" for over a year, and that the City was both "incentiviz[ing] growth away from

[the Jersey City] waterfront [and] gradually phas[ing] out the past structure of tax abatements." On August 2, 2018, he tweeted that he was "phasing [tax abatements] out," and on August 6, 2018, he tweeted that "[w]e've been phasing out long term tax abatements." (Compl. ¶ 124.)

Despite these self-serving statements, Fulop's Executive Order 2015-007, which requires mayoral approval of tax abatement applications made in accordance with the policies therein, still remains in effect. Under that policy, JSP's tax abatement application should have been approved long ago. (Compl. ¶ 125.)

LEGAL ARGUMENT

I. MOTION TO DISMISS STANDARD

The Complaint properly states claims under the prevailing standard at this pre-discovery stage of the litigation. The Supreme Court has held that "Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'"[3] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). The complaint need not include "detailed factual allegations," and all well-pleaded allegations are accepted as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009) (citing *Twombly*, 550 U.S. at 555)). A complaint containing well-pleaded facts from which a plausible claim for relief can be inferred is not subject to dismissal on a motion under Federal Rule of Civil Procedure 12(b)(6). *Id.* at 678 ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." (citing *Twombly*, 550 U.S. at 570)). Rule 8(a) does not impose a "probability requirement" on the plaintiff, but merely requires that the

[3] "[T]he Supreme Court's emphasis on Rule 8's requirement of a 'showing' is new," but does not impose any additional requirements beyond that the pleading contain a "a short and plain statement of the claim and its grounds." *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008) (citing *Twombly*, 550 U.S. at 555 n.3).

complaint plead more than "a sheer possibility that a defendant has acted unlawfully." *Id.* (citing *Twombly*, 550 U.S. at 556).

The Third Circuit has cautioned that the plausibility standard set forth in *Twombly* and *Iqbal* "does not impose a heightened pleading requirement, and that Federal Rule of Civil Procedure 8(a) continues to require only a 'showing' that the pleader is entitled to relief." *Schuchardt v. President of the United States*, 839 F.3d 336, 347 (3d Cir. 2016) (citing *Phillips*, 515 F.3d at 233-34). Indeed, the *Twombly* Court expressly disavowed a heightened standard that would require the pleading of specific facts showing an entitlement to relief. *Twombly*, 550 U.S. at 569-70. "Implicit in the notion that a plaintiff need not plead 'specific facts' to survive a motion to dismiss is that courts cannot inject evidentiary issues into the plausibility determination." *Schuchardt*, 839 F.3d at 347 (citing *Twombly*, 550 U.S. at 556). Permitting a court to do so "would confuse the principles applicable to a motion to dismiss with those governing a motion for summary judgment." *Id.* at 348 (citations omitted).

The trial court's analysis of whether a complaint states a plausible claim for relief is "a context-specific task" that requires the "court to draw on its judicial experience and common sense." *Connelly v. Lane Constr. Corp.*, 809 F.3d 780, 786-87 (3d Cir. 2016) (quoting *Iqbal*, 556 U.S. at 679). "[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of [the facts alleged] is improbable, and 'that a recovery is very remote and unlikely.'" *Twombly*, 550 U.S. at 556 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

The Third Circuit has observed that the pleading standards set forth in *Twombly* and *Iqbal* require a three-step analysis. *Connelly*, 809 F.3d at 787. First, the court "must 'tak[e] note of the elements [the] plaintiff must plead to state a claim.'" *Connelly*, 809 F.3d at 787 (quoting *Iqbal*, 556 U.S. at 675). Next, the court "should identify allegations that, 'because they are no

more than conclusions, are not entitled to the assumption of truth." *Id.* (quoting *Iqbal*, 556 U.S. at 679). Third, the court must assume the truth of the remaining well-pleaded factual allegations and "then determine whether they plausibly give rise to an entitlement to relief." *Id.* (quoting *Iqbal*, 556 U.S. at 679).

While Defendants pay lip service to these pleading standards, they turn the motion to dismiss standard on its head. Defendants ignore the well-pleaded and detailed allegations in the Complaint, and attempt to weigh and qualitatively evaluate the pleaded facts, thus imposing a heightened standard that is akin to either (a) the weighing and evaluating of evidence following a trial, or (b) the standard governing motions for summary judgment. Plaintiffs' 57-page, 209-paragraph Complaint more than satisfies these standards for well-pleaded, non-conclusory allegations of plausible claims for the relief asserted, and therefore satisfies the pleading standards established in *Twombly* and *Iqbal*.

II. DEFENDANTS' MOTIONS TO DISMISS BASED ON ALLEGED LACK OF STANDING SHOULD BE DENIED AS PLAINTIFFS HAVE SUFFERED ACTUAL CONTRACT INJURY TO THEIR RIGHTS DUE TO THE WRONGFUL CONDUCT ALLEGED IN THE COMPLAINT SUFFICIENT TO ESTABLISH STANDING.

Each of Defendants' standing arguments begins with the misplaced premise that Plaintiffs are attempting to assert the legal rights of Jared Kushner rather than their own. City Br. 7; JCRA Br. 5-6; Fulop Br. 6. Defendants entirely ignore the injuries suffered by Plaintiffs, themselves, as actually pled in the Complaint. An entity acquires standing either: (1) "in its own right to seek judicial relief from injury to itself"; or (2) "on behalf of its members" based on third-party standing. *Addiction Specialists, Inc. v. Twp. of Hampton*, 411 F.3d 399, 406 (3d Cir. 2005). Defendants ignore the first category of standing, focusing instead on "circumstances that allow a litigant to assert claims on behalf of a third party." City Br. 7-8.

The Complaint, however, pleads concrete injury sufficient to confer standing upon Plaintiffs: Defendants unconstitutionally terminated the Redevelopment Agreement with Plaintiffs (Compl. ¶¶ 99, 117); blocked development of Plaintiffs' own property (Compl. ¶¶ 115-117); rendered virtually worthless Plaintiffs' investment of $55 million in expenses for planning construction (Compl. ¶¶ 117, 130, 149); and induced Plaintiffs to pay $2.5 million in a side Pledge Agreement to rehabilitate Loew's Theatre with the promise of receiving the same consideration for tax abatements as Defendants provided to the previous two developers (Compl. ¶¶ 30, 49, 58, 79). Whatever injury Jared Kushner, individually, may or may not also have suffered, Plaintiffs are in no way seeking recovery for his damages, or seeking to assert anyone else's rights but their own.

"[I]n order to have standing under the Constitution, a plaintiff must show (1) an actual injury that is (2) causally connected to the conduct complained of and (3) likely to be 'redressed by a favorable decision.'" *Hassan v. City of N.Y.*, 804 F.3d 277, 289 (3d Cir. 2015) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). Defendants wrongly argue that the Court should look "beyond the pleadings" to "independently evaluate the evidence," which improperly conflates the standard of review for pleading constitutional standing with that of "waiver of sovereign immunity." JCRA Br. 5 (citing *CNA v. United States*, 535 F.3d 132, 140 (3d Cir. 2008)). The correct standard is as follows: "[f]or purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 501 (1975). "General factual allegations of injury resulting from the defendant's actions may be sufficient at the motion to dismiss stage." *Nichols v. City of Rehoboth Beach*, 836 F.3d 275, 285 (3d Cir. 2016). Plaintiffs' Complaint satisfies this standard.

A. The Unconstitutional Termination of Plaintiffs' Redevelopment Agreement, Obstruction Of Development Of Plaintiffs' Land, And Forfeiture Of Plaintiffs' Construction Expenses Constitute Actual Corporate Injury

The Article III analysis of "actual injury" examines whether the party has a "personal stake in the outcome of the controversy," *Baker v. Carr*, 369 U.S. 186, 204 (1962), or faces effects that are "too abstract" for relief. *Allen v. Wright*, 468 U.S. 737, 751 (1984). "Injury in fact" is "an invasion of a legally protected interest which is [] concrete and particularized . . . not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (internal citations omitted) (finding no standing where plaintiff merely had "every citizen's interest in proper application of the Constitution and laws").

When a state actor causes injury to a company, the "corporation has standing to bring constitutional claims on its own behalf." *Addiction Specialists, Inc. v. Twp. of Hampton*, 411 F.3d 399, 407 n.6 (3d Cir. 2005). Indeed, 42 U.S.C. § 1983 expressly extends the private right of action to any person injured by the state actor, who "shall be liable to the party injured in an action at law" by the deprivation of constitutional rights. An injury is primarily corporate in nature when it results in fines or lost business opportunities. *See Kauffman v. Dreyfus Fund, Inc.*, 434 F.2d 727, 732 (3d Cir. 1970) ("[W]hen the alleged injury is inflicted upon the corporation . . . it has been consistently held that the primary wrong is to the corporate body"). Illegal state action may cause multiple injuries to different plaintiffs' interests, each conferring standing. For example, in the very authority cited by Defendants, *Addiction Specialists*, 411 F.3d at 405, 408, the Third Circuit held that a town's unconstitutional attempts to obstruct a developer's construction of a methadone treatment center vested § 1983 standing not just in the disabled individuals whom the town sought to exclude, but also the injured developer. In finding the developer had standing, the Court found "ASI does not assert its § 1983 claims on behalf of

individuals with disabilities, but rather brings these claims primarily on its own behalf." *Id.* at 407. Thus, arbitrary obstruction of a developer's project creates multiple independent injuries, both in the developer and separately in the developer's customers or vendors, each of which had standing to pursue § 1983 claims. *Id.*; *see Oxford Assocs. v. Waste Sys. Auth.*, 271 F.3d 140, 146 (3d Cir. 2001) (reversing dismissal for lack of standing because property owners, who contracted with in-state and out-of-state waste management vendors, had standing in their own right to assert § 1983 claim related to unconstitutional discrimination against out-of-state vendors because they suffered injury of "pay[ing] a non-competitive fee to use that Facility.").

Here, Plaintiffs have pled "actual injury" to their "legally protected interest," *Lujan*, 504 U.S. at 560, emanating from Defendants' unconstitutional actions: (1) termination of Plaintiffs' Redevelopment Agreement; (2) obstruction of Plaintiffs' planned development of its property; (3) the loss of investment of $55 million in expenses in specific development plans; and (4) induced payment of $2.5 million for cooperation with Plaintiffs' tax abatement application. Defendants' Notice of Default blocked further governmental approvals and froze Plaintiffs' $57 million in financing, with the effect of completely obstructing construction of the project. Compl. ¶¶ 115-117. Plaintiffs' injury from Defendants' blocking further development of Plaintiffs' property falls well within the injury recognized by *Addiction Specialists* to confer Plaintiffs with standing. 411 F.3d at 407 (citing *Gwynedd Props., Inc. v. Lower Gwynedd Twp.*, 970 F.2d 1195, 1197 (3d Cir. 1992) (entertaining a development corporation's § 1983 due process claim alleging that a municipality violated the corporation's right to reasonable use and development of its land); *Heritage Farms, Inc. v. Solebury Twp.*, 671 F.2d 743, 748 (3d Cir. 1982) (reversing dismissal of land developer's § 1983 claim that local government "used their governmental offices to further an illegal conspiracy to destroy plaintiffs' constitutional rights

to" develop its property)). Moreover, Plaintiffs plead they expended $55 million in preparation for construction, including amended site plans, engineering and designs. Compl. ¶¶ 1, 59, 117, 130, 149. These expenses constitute injury as a matter of law. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 262 (1977) (finding 1983 standing where "[developer] has expended thousands of dollars on the plans for Lincoln Green and on the studies submitted to the Village in support of the petition for rezoning" which were rendered "worthless."). Finally, the unconstitutional termination of a contractual business opportunity, *see* Compl. ¶¶ 98-118, constitutes injury sufficient to confer standing upon a company. *Adarand Constructors v. Pena*, 515 U.S. 200, 211 (1995) (finding "loss of that contract" provides standing to company to assert constitutional violation); *Hudson Valley Freedom Theater, Inc. v. Heimbach*, 671 F.2d 702 (2d Cir. 1982) (finding denial of government contract constituted injury).

Defendants' own cases do not support their position on these facts. For example, Defendants surprisingly rely upon *Toll Brothers, Inc. v. Township of Readington*, 555 F.3d 131, 142 (3d Cir. 2009), where the Third Circuit reversed the district court's dismissal for lack of standing and instead found that the developer had suffered each form of injury above. (JCRA Br. 5; Fulop Br. 6.) There, the municipality rezoned an area "for families with children" into an "agricultural" district in order to block the developer with an option to purchase property from developing housing. *Toll Bros.*, 555 F.3d at 135. The Third Circuit rejected the argument that the developer/optionee was attempting to assert the property owners' rights:

> "[Developer] Toll Brothers' complaint alleges that the Township rezoned the Readington Properties parcel to drive down its value and acquire it cheaply. By driving down the value of the Readington Properties parcel, the Township has also driven down the value of Toll Brothers' option. This harm to Toll Brothers' *own* property is a classic form of economic injury."

Id. at 142 (emphasis in original, internal citations, alterations, and quotation marks omitted). It further held that the "lost opportunity to develop a specific tract of land for which it holds an exclusive option to buy" and the waste of "substantial sums in planning its proposed developments"—the same injuries suffered by Plaintiffs here—constituted cognizable injury that confers standing. *Id.* at 140.

B. Plaintiffs Have Not Invoked The Third-Party Standing Doctrine, And It Forms No Part of The Article III Standing Analysis

Defendants' brief strikes down a straw man of third-party standing that simply does not exist here. It is Plaintiffs – not Jared Kushner individually – who are party to the allegedly defaulted Redevelopment Agreement; it is Plaintiffs – not Jared Kushner – who invested $55 million in development costs and $2.5 million for Loew's Theatre; and it is Plaintiffs – not Jared Kushner – who own the property that can no longer be developed due to Defendants' improper actions. Defendants fail to conduct the requisite Article III analysis and do not evaluate any of "the particular claims asserted," as required. *Allen v. Wright*, 468 U.S. 737, 752 (1984). Tellingly, Defendants' standing argument not once cites to the Complaint—instead broadly asserting that "all of Section 1983 [sic] claims assert claims that relate solely to Jared Kushner's actions." (City Br. 9; JCRA Br. 5-6.) But even a cursory review of the Complaint's allegations reveals that this is not so. As discussed above, Plaintiffs do not, and need not, invoke third-party standing because they seek to vindicate injury to their own rights.

The third-party standing analysis, or *jus tertii*, is not an element of any part of the Article III standing test, and is a separate doctrine applied "when the plaintiff is not himself the object of the government action or inaction." *Lujan*, 504 U.S. at 562. Defendants cite the transparently inapplicable case *Amato v. Wilentz*, 952 F.2d 742, 748-49 (3d Cir. 1991), JCRA Br. 7-9, where plaintiff Essex County admittedly was not the subject of any government action, but sought to

stand in the shoes of filmmaker Warner Brothers to sue the Chief Justice of the New Jersey Supreme Court for refusing to permit filming in the Court and the consequent loss of economic investment. Unlike *Amato*, there is no need for Plaintiffs to step into someone else's shoes here because Plaintiffs themselves were the object of state action. With respect to their equal protection claims, Plaintiffs as developers have their own right not to be intentionally "treated differently from others similarly situated" without a "rational basis for the difference in treatment." *Hill v. Borough of Kutztown*, 455 F.3d 225, 239 (3d Cir. 2006). The "rightholders" are Plaintiffs – not Jared Kushner. *Vill. of Arlington Heights*, 429 U.S. at 263 (holding developer has independent right "to be free of arbitrary or irrational zoning actions."); *Addiction Specialists*, 411 F.3d at 407 (finding standing for developer to assert equal protection claim that it was treated differently from similarly situated developers). Similarly, with respect to due process claims, Plaintiffs are exercising their own right of "a development corporation's 1983 due process" to the "reasonable use and development of land." *Addiction Specialists*, 411 F.3d at 407 (citing *Gwynedd Props.*, 970 F.2d at 1197); *Barrett v. United States*, 689 F.2d 324, 333 (2d Cir. 1982) ("Corporations, because they are associations of individuals united for a special purpose, have long been viewed as persons for due process purposes.") (internal quotation marks omitted).

The only claim that even requires reference to Jared Kushner is Plaintiffs' First Amendment claim. However, the Complaint also alleges that Charles Kushner held an event for Mr. Trump as well. (Compl. ¶ 61.) But Courts have long held that there is corporate standing in its own right when a company suffers injury as retaliation for an employee or officer's protected conduct. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2772-73 (2014) ("A corporation is simply a form of organization used by human beings to achieve desired ends. . .

And protecting the free-exercise rights of corporations like Hobby Lobby, Conestoga, and Mardel protects the religious liberty of the humans who own and control those companies."); *O'Hare Truck Serv. v. City of Northlake*, 518 U.S. 712, 725 (1996) (holding company had § 1983 claim for unconstitutional cancellation of service contract in retaliation for officer's political speech). Before being reversed by the Supreme Court, the Third Circuit adopted an argument identical to that asserted by Defendants here, *i.e.*, that a company was attempting to raise third parties' First Amendment rights when it asserted claims based upon its owners' protected conduct. *See Conestoga Wood Specialties Corp. v. Sec'y of the United States HHS*, 724 F.3d 377, 388 (3d Cir. 2013), *rev'd and remanded sub nom. Burwell*, 134 S. Ct. 2751. The Supreme Court rejected the argument, holding that the company had standing in its own right to be free from fines that punish the "exercise of religion under the First Amendment." *Burwell*, 134 S. Ct. at 2768. Indeed, the Third Circuit has now endorsed the holding of every Court of Appeals to consider the issue, finding that when a state actor punishes a company for an employee or officer's constitutionally protected conduct, the company has standing itself. *See McClain v. Avis Rent a Car Sys.*, 648 F. App'x 218, 222 n.4 (3d Cir. 2016) ("We are satisfied that L&M has Article III standing as it alleged that it sustained an injury-in-fact as a result of the allegedly racially motivated termination of its contract with Avis.") (citing *Gersman v. Group Health Ass'n, Inc.*, 931 F.2d 1565, 1569 (D.C. Cir. 1991) (finding company had standing to assert claim for termination of contract based upon owner's religion because "if a corporation can suffer harm from discrimination, it has standing to litigate that harm")); *Hudson Valley Freedom Theater*, 671 F.2d at 706 (reversing dismissal, finding company had standing to assert discriminatory denial of grant based upon "principle that a corporation may assert equal protection claims when it alleges discrimination because of the color of its stockholders").

Separately and independently from corporate standing above, a plaintiff also has standing to assert the right to be free from retaliation for *another's* exercise of free speech. *Montone v. City of Jersey City*, 709 F.3d 181, 198-99 (3d Cir. 2013). There, the Third Circuit directly rejected Defendants' standing argument that because there is "no allegation that [Plaintiffs] have engaged in any political activity," Plaintiffs purportedly lack standing. In *Montone*, Jersey City imposed collective punishment against members of the police department for officer Montone's political support of the mayor's election opponent, halting "all promotions from sergeant to lieutenant"—including for the Astriab plaintiffs who did not engage in any protected speech like Montone. *Id.* at 186. The Third Circuit held that the Astriab plaintiffs had standing in their own right, "to bring an action for First Amendment political affiliation retaliation pursuant to § 1983 based on the defendant's alleged deprivation of another's First Amendment rights." *Id.* at 196. Thus, separate and apart from Plaintiffs' rights as a corporation to bring claims for retaliation, Plaintiffs also have "standing to bring an action for First Amendment political affiliation retaliation pursuant to § 1983, even where, as here, the alleged retaliation was directed towards another individual." *Id.* at 198 (citing *Thompson v. N. Am. Stainless, LP*, 131 S. Ct. 863 (2011)). Accordingly, Plaintiffs are not asserting Jared Kushner's third-party rights or damages claims, and even if they were with respect to the First Amendment counts (which they are not), Plaintiffs would still have standing to do so given Mr. Kushner's former CEO status.

C. Plaintiffs' Injury Is Traceable To Defendants' Actions And Will Be Redressed By A Favorable Judgment

The second element of Article III involves causation, that the identified injury is "fairly . . . trace[able] to the challenged action of the defendant." *Hassan v. City of N.Y.*, 804 F.3d 277, 289 (3d Cir. 2015); *see Allen v. Wright*, 468 U.S. 737 (1984) (finding plaintiffs' concrete injury in being denied education in a racially integrated setting was not fairly traceable to defendant

IRS' failure to enforce regulations for maintaining non-profit tax benefits). Here, the Complaint is replete with allegations of how Plaintiffs' damages are attributable to Defendants' actions, such as the improper Notice of Default and the failure to support and approve tax abatements that were contractually required and granted to similarly situated developers. Thus, the second element for standing is met.

The third element is that the injury will be "likely . . . redressed by a favorable decision." *Hassan*, 804 F.3d at 289. "When the suit is one challenging the legality of government action or inaction . . . [and] the plaintiff is himself an object of the action (or forgone action) at issue . . . there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." *Lujan*, 504 U.S. at 561-62. Defendants have not contested the element of redressability, nor could they, as Plaintiffs allege that Defendants acted directly upon Plaintiffs to obstruct development, and seek damages and an injunction to redress those rights and the damages caused by Defendants' actions.[4]

III. DEFENDANTS' MOTION TO DISMISS THE CIVIL RIGHTS CLAIMS BASED ON THE ALLEGED FAILURE TO PLEAD A "POLICY OR CUSTOM" RESULTING IN INJURY MUST BE DENIED AS THE DIRECT ACTION BY THE CITY TO TERMINATE THE REDEVELOPMENT AGREEMENT AND OBSTRUCT CONSTRUCTION, THROUGH ITS INSTRUMENTALITY THE JCRA, CONSTITUTES MUNICIPAL ACTION UNDER *MONELL*.

Defendant Jersey City contends that Plaintiffs cannot assert municipal liability under *Monell* because Plaintiffs purportedly "fail[] to adequately allege that the City adopted a policy or custom." City Br. 10. But *Monell* holds only that the theory of liability of *respondeat superior* is not available against a local government "based upon the isolated acts by government officials and employees." *St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988). The "official

[4] Unlike the constitutional standing requirements of Article III, there are also elements of "prudential" standing which is "not jurisdictional." *Elkin v. Fauver*, 969 F.2d 48, 52 n.1 (3d Cir. 1992) (citing *Craig v. Boren*, 429 U.S. 190, 193 (1976)). Defendants have not raised arguments with respect to prudential standing, but these would be satisfied here as well.

policy requirement was intended to distinguish acts of the municipality from acts of employees of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479 (1986). Thus, where the municipality itself is the relevant actor, rather than its employee, municipal liability necessarily attaches. *Langford v. City of Atl. City*, 235 F.3d 845, 848 (3d Cir. 2000) ("No one has ever doubted, for instance, that a municipality may be liable under § 1983 for a single decision by its properly constituted legislative body . . . because even a single decision by such a body unquestionably constitutes an act of official government policy."); *Kuchka v. Kile*, 634 F. Supp. 502, 507 (M.D. Pa. 1985) (finding direct action by Columbia County Redevelopment Authority was sufficient to state municipal liability). Here, the Defendants' official action of cancelling the Redevelopment Agreement through the instrumentality they control, the JCRA, represents acts of the municipality itself. Compl. ¶¶ 98-118. *See Newport v. Fact Concerts*, 453 U.S. 247, 251 (1981) (holding decision by the mayor and city council to "cancel the contract" with a service provider constituted municipal action to which *Monell* liability attached); *Owen v. City of Independence*, 445 U.S. 622 (1980) (finding municipal liability where City Council passed resolution firing plaintiff without a pretermination hearing).

Moreover, "a single decision taken by the highest officials responsible for setting policy in that area of the government's business" satisfies *Monell. Praprotnik*, 485 U.S. at 123; *see McGreevy v. Stroup*, 413 F.3d 359, 367-68 (3d Cir. 2005) ("[A]n official with policymaking authority can create official policy, even by rendering a single decision."). "[W]here a government's authorized decision maker adopts a particular course of action, the government may be responsible for that policy . . . ." *Id.* (quoting *Pembaur*, 475 U.S. at 481). An individual

has "final policy-making authority" and "bind[s] the municipality by his conduct" based on: "(1) whether, as a matter of state law, the official is responsible for making policy in the particular area of municipal business in question, and (2) whether the official's authority to make policy in that area is final and unreviewable." *Hill*, 455 F.3d at 245.

Mayor Fulop had final, unreviewable authority over the termination of Plaintiffs' Redevelopment Agreement. "The City of Jersey City adopted the mayor-council plan of government pursuant to the Faulkner Act," *Casamasino v. City of Jersey City*, 158 N.J. 333, 342 (1999), and accordingly, all "executive power of the municipality shall be exercised by the mayor," N.J.S.A. § 40:69A-39. This includes the power over the negotiation and execution of municipal "contracts." N.J.S.A. § 40:69A-40. The JCRA is an entity that is expressly defined an instrumentality of Jersey City, Compl. ¶ 6, and controlled by the municipality pursuant to law, N.J.S.A. § 40A:12A-11 ("The agency shall be an instrumentality of the municipality creating it."). Mayor Fulop controlled its decision-making (Compl. ¶ 6), including the negotiation of the Redevelopment Agreement, the JCRA's performance (Compl. ¶ 47), and its termination (Compl. ¶¶ 98, 117). He posted on the social media platform Twitter that the JCRA "defaulted Kushner/KABR" and "this will now move to a different partner that can complete the project." Compl. ¶ 118. At Fulop's insistence, the Agreement was terminated, obstructing Plaintiffs from moving forward with construction. Compl. ¶¶ 115-118. Similarly, Mayor Fulop had control over the failure to submit the tax abatement applications for approval. N.J.S.A. § 40A:20-8 ("The application shall be addressed and submitted to the mayor or other chief executive officer of the municipality. The mayor or other chief executive officer shall, within 60 days of his receipt of the application thereafter, submit the application with his recommendations to the municipal governing body."). Contrary to the law requiring submission within 60 days, he

refused to consider Plaintiffs' abatement application (as the City did the previous owners of the project), illegally delayed submission, and declared that "the City is not supportive of their request" on the social media platform Twitter. Compl. ¶¶ 72, 74 and 97). He later posted that "we don't see support for incentives or abatements from the city for this project. . . I suspect it's DOA." Compl. ¶ 92.[5] But he noted to Plaintiffs' representatives that this position would change if the Kushner family "was no longer part of the Project." Compl. ¶¶ 88-89. Taking the facts pled in the Complaint as true for the purposes of these motions to dismiss, Fulop admitted that he had the power to take the challenged action and there is "no one above the mayor who had the power to curtail his conduct." Accordingly, under *Monell*, Fulop was "final policy maker." *Hill*, 455 F.3d at 245. (finding mayor bound municipality for purposes of *Monell* liability) (citing *Bartholomew v. Fischl*, 782 F.2d 1148, 1153 (3d Cir. 1986) (holding that mayor bound municipality by persuading city council to terminate plaintiff, thus acting as final decision maker)). Plaintiffs should accordingly be afforded the opportunity to conduct discovery to further confirm Fulop's admissions and his final decision-making role beyond the facts already sufficiently alleged to survive this motion.

IV. THE COMPLAINT PROPERLY PLEADS THE CLAIM FOR VIOLATION OF THE SUBSTANTIVE DUE PROCESS CLAUSE BASED UPON THE DEFENDANTS' ARBITRARY AND IRRATIONAL CONDUCT IN DEPRIVING PLAINTIFFS OF THEIR PROPERTY RIGHTS BASED UPON POLITICAL ANIMUS AND NOT ANY LEGITIMATE CONTRACT BASIS.

Defendants' arguments for dismissal of Plaintiffs' Substantive Due Process claim fail in several respects. The "substantive component of the Due Process Clause limits what governments may do regardless of the fairness of the procedures that it employs." *Boyanowski v.*

[5] All of this was done despite (1) the Redevelopment Agreement obligating the City and JCRA to "cooperate" and assist Plaintiff in obtaining tax abatements which had already been issued to the prior Redeveloper and (2) Fulop being required by his own Executive Order 2015-007 to "recommend" issuance of the tax abatements. Compl. ¶¶ 17-18, 41.

Capital Area Intermediate Unit, 215 F.3d 396, 399 (3d Cir. 2000). Such a claim falls into one of two frameworks depending upon whether the claim involves: "legislative" acts on the one hand; or "non-legislative, executive acts," which "typically apply to one person or to a limited number of persons." *Nicholas v. Pa. State Univ.*, 227 F.3d 133, 139 n.1 (3d Cir. 2000). Defendants' wrongful actions are not alleged to involve legislation and are directed at Plaintiffs, a single redeveloper. To state a substantive due process claim under the non-legislative framework, a plaintiff must plead: (1) "the property interest being deprived is fundamental under the Constitution"; and (2) that there was an "arbitrary or irrational deprivation, regardless of the adequacy of procedures used." *Id.* at 142.

A. Plaintiffs Have a Fundamental Property Interest in the One Journal Square Project, the Underlying Land and its Rights Under the Redevelopment Agreement

The Defendants are plainly mistaken in contending that Plaintiffs do not identify a property interest protected by the Fourteenth Amendment. City Br. at 23. As noted in detail in Point IV above, Plaintiffs' protectable property interest is plainly set forth in the Complaint and includes deprivation of its rights in the real property, deprivation of its development rights under the Redevelopment Agreement and loss of its $55 million investment in the Project. Plaintiffs allege that they "have had, and continue to have, a protected constitutional interest in and to the contractual rights set forth in the complex Redevelopment Agreement, and the underlying property on which the Project is to be developed" and that "Plaintiffs also have the right to be free from unlawful action by Defendants." Compl. ¶ 152. The Third Circuit has found as a matter of law that planned development in connection with "real property ownership" is a fundamental interest protected by substantive due process. *Nicholas*, 227 F.3d at 141 ("[L]and ownership is a property interest worthy of substantive due process protection") (internal

alterations omitted); *Connection Training Servs. v. City of Philadelphia.*, 358 F. App'x 315, 320, 2009 U.S. App. LEXIS 28072, *14 (3d Cir. 2009) (observing that the Third Circuit has "limited non-legislative substantive due process rights to real property ownership"). Moreover, "governmental permission required for some intended use of land owned by the plaintiffs implicate[s] the kind of property interest protected by substantive due process." *Woodwind Estates Ltd. v. Gretkowski*, 205 F.3d 118, 123 (3d Cir. 2000).

Thus, the Defendants' contention that the Complaint does not adequately plead deprivation of a property right is meritless.

B. Plaintiffs Have Been Arbitrarily Deprived of Their Property Interest Through Acts That "Shock The Conscience"

i. Defendants' Conduct Should Be Subjected to the Highest Level of Scrutiny

In addition to identifying deprivation of a property right, in order to establish a substantive due process violation, "a plaintiff . . . must demonstrate that the official's conduct 'shocks the conscience' *in the particular setting* in which that conduct occurred." *Nicini v. Morra*, 212 F.3d 798, 810 (3d Cir. 2000) (emphasis added). The Third Circuit has explained that whether conduct shocks the conscience is an adaptive standard, as "[t]he exact degree of wrongfulness necessary to reach the 'conscience-shocking' level depends upon the circumstances of a particular case, because a 'higher fault standard is proper when a government official is acting instantaneously and making pressured decisions without the ability to fully consider their risks.'" *B.S. v. Somerset Cnty.*, 704 F.3d 250, 267-68 (3d Cir. 2013) (quoting *Miller*, 174 F.3d at 375-76). The standard has been described as a sliding scale based on varying levels of urgency and duty: where the situation is "hyper-pressurized," the official's conduct will have to rise to a higher level of wrongdoing (i.e., be "more conscience-shocking" or approach acting with purpose of causing harm) to impose liability. *See, e.g., Leamer v. Fauver*, 288 F.3d

532, 546 (3d Cir. 2002) (noting that a prison medical official's indifference is conscience-shocking in cases of inmate welfare because of protracted timeframe and obligation to inmate care); *Miller v. City of Philadelphia*, 174 F.3d 368, 375-76 (3d Cir. 1999) (noting that social worker is operating under less urgency than a prison riot or high-speed chase and so "in order for liability to attach, . . . need not have acted with the 'purpose to cause harm,' but the standard of culpability . . . must exceed both negligence and deliberate indifference, and reach a [conscience-shocking] level of gross negligence or arbitrariness.").

Defendants here should be held to the highest level of scrutiny because they had the luxury of an unhurried decision-making process concerning a commercial (and non-life threatening) matter. There has been no assertion that Mayor Fulop was reacting to an emergent development that risked life or property and his motives are credibly alleged to have been aimed at causing harm to Plaintiffs' ownership interests for political gain, or hatred of President Trump. In declaring Plaintiffs to be in default and suspending all further development, for political reasons and hatred of President Trump, Defendants had the benefit of months of deliberation to reach an "unhurried judgment." *See Beard v. Borough of Duncansville*, 652 F. Supp. 2d 611, 625 (W.D. Pa. 2009) (holding borough's action with respect to redevelopment "had the 'luxury of proceeding in a deliberate fashion' and, as such, providing evidence of deliberate indifference to the rights of [plaintiff] would be the proper approach to evaluating the 'shocks the conscience' standard."). Accordingly, context dictates that the decision here was made in a calculated and deliberative manner that would more easily "shock the conscience" than under more urgent circumstances.

ii. Plaintiffs' Pleadings Satisfy the Conscience-Shocking Standard

Plaintiffs plead retaliation by Defendants stemming from Jared Kushner's (and his

family's) close personal and political affiliation with a presidential administration vociferously opposed by Mayor Fulop. *See* Compl. ¶¶ 89-94. A complaint states a claim if its well-pled facts support the inference of "arbitrary action of government . . . in the exercise of power without any reasonable justification in the service of a legitimate governmental objective." *Lewis*, 523 U.S. at 845-46; *see also, e.g., Feibush v. Johnson*, 2015 U.S. Dist. LEXIS 193185 (E.D. Pa. Mar. 20, 2015) (denying motion to dismiss substantive due process claim where city "notified [plaintiff] that he had been selected as the developer for the site, and, in reliance on this communication, [plaintiff] purchased private lots on the same block and incurred development costs. . . [but] Councilman Johnson unilaterally stopped the sale") (internal quotation marks omitted). As District Courts within this Circuit have found, such intentional interference meets even the most stringent standard where the actor "deliberately and arbitrarily abused [the government's] power," *Nicholas*, 227 F.3d at 139, let alone the more lenient standard of "deliberate indifference" to a plaintiff's legal rights. *See New Horizon Inv. Corp. v. Mayor & Mun. Council of Belleville*, No. 2005 U.S. Dist. LEXIS 21665, at *24 (D.N.J. Sep. 9, 2005) (Hayden, J.) ("[Allegations that defendant] deliberately acted to cheat the plaintiffs out of all economically beneficial use of their properties, *after* affirmatively promising the plaintiffs they could actively develop these parcels . . . pleaded substantive due process sufficiently to withstand a motion to dismiss.") (emphasis in original); *Beard*, 652 F. Supp. 2d at 625 (denying summary judgment where reasonable jury could find conscience-shocking behavior where city took easement over portions of plaintiff's property even after being advised that it did not have statutory authority to support action because "Plaintiffs produced sufficient evidence for a reasonable jury to conclude that the Defendant Borough acted with deliberate indifference towards the property rights of the Plaintiffs, thus shocking the conscience."); *MFS, Inc. v.*

DiLazaro, 2009 U.S. Dist. LEXIS 89125, at *57-58 (E.D. Pa. Sep. 25, 2009) ("There is also a genuine issue of material fact as to whether Defendants knew that their actions in blocking the issuance of the Title V permit were wrong and/or in violation of their authority . . . [and] a genuine and material dispute here as to whether Defendants were acting in the public interest or whether they were arbitrarily attempting to close the plant. If the latter is proved at trial, an inference can be drawn that Defendants' conduct shocks the conscience.").

Defendants submit that this case is governed by application of the "shocked the conscience" standard in the specific context of a "zoning" dispute. *See UA Theatre Circuit*, 316 F.3d at 402. Not so. Plaintiffs prevailed in all zoning applications, which applications were approved with consent and support of the Jersey City Planning Department and approved by both the Jersey City and Hudson County Planning Boards. Compt. ¶¶50-57. It was only after all zoning issues were finally resolved, and former Kushner Companies CEO Jared Kushner joined the Trump administration, that Fulop and the JCRA irrationally declared Plaintiffs in default. Accordingly, unlike in *UA Theatre Circuit*, Plaintiffs are not asking the court to act as any sort of "zoning board of appeals," *id.* at 402, and Defendants' reliance upon cases regarding zoning disputes is wholly misplaced.

Regardless, even if the standard in the zoning context applied, which it does not, Plaintiffs state sufficient allegations of conscience-shocking behavior. In *UA Theatre Circuit*, the Third Circuit rejected use of a lower "improper motive" standard in a substantive due process claim challenging municipal zoning, and instead applied the conventional test under *Lewis* of whether the action "shocks the conscience." *Id.* at 400-02 ("Application of the 'shocks the conscience' standard in this context also prevents us from being cast in the role of a 'zoning board of appeals.'"). Accordingly, in challenging a zoning decision, a plaintiff's claim that the

board made an error of law—even an egregious error in bad faith—is "just disagreement about conventional zoning or planning rules" and not conscience shocking conduct. *Eichenlaub v. Twp. of Ind.*, 385 F.3d 274, 285 (3d Cir. 2004); *see, e.g., Levin v. Upper Makefield Twp.*, 90 F. App'x 653, 663 (3d Cir. 2004) (finding alleged errors of law, that defendant "voted to send the Solicitor to oppose Levin's application without even reviewing it," of "*ex parte* communications," and "delay in issuing permits" was insufficient to survive summary judgment). But the Third Circuit made clear that, even in challenges to zoning decisions, evidence of "seeking to hamper development in order to interfere with otherwise constitutionally protected activity," "bias against an ethnic group," or "corruption or self-dealing" creates a jury question of whether the conduct shocked the conscience. *Eichenlaub*, 385 F.3d at 285.

iii. The Standard of Review at the Pleading Stage compels Denial of the Motions

At the pleading stage, it is sufficient to state "conscience shocking" conduct in zoning disputes through allegations that a municipality interfered with a protected constitutional right, *Assocs. in Obstetrics & Gynecology v. Upper Merion Twp.*, 270 F. Supp. 2d 633, 655 (E.D. Pa. 2003) (abortion rights), or had animosity toward a protected class, *MARJAC, Ltd. Liab. Co. v. Trenk*, 380 F. App'x 142, 147-48 (3d Cir. 2010) ("Township Attorney's selective enforcement of municipal zoning laws was motivated by antipathy toward Italians - conduct which may shock the conscience - creates a genuine issue of material fact sufficient to survive summary judgment."). Similarly, it is also sufficient to state conscience-shocking conduct to allege "corruption or self-dealing," such as action for the personal benefit of decision maker's finances, *see Ecotone Farm LLC v. Ward*, 639 F. App'x 118, 126 (3d Cir. 2016) (where zoning officer "obstruct[ed] full enjoyment of [plaintiff's] land . . . [for] their own private interests), or political fortunes, *see Lonzetta Trucking & Excavating Co. v. Schan*, 144 F. App'x 206, 209 (3d Cir.

2005) (where board revoked permits in response to political pressure).

Here, Plaintiffs allege (i) that they obtained valid governmental approvals for development; (ii) that the former CEO of the Kushner Companies (and other members of his family) engaged in the constitutionally protected activity of supporting and joining a presidential administration; (iii) that Defendants acted arbitrarily and illegally by issuance of a fabricated Notice of Default and suspended development to interfere with Plaintiffs' constitutionally protected activity; and (iv) that Defendants did so intentionally, with political animus directed towards the Kushner Family and President Trump for the personal political benefit of Mayor Fulop. These allegations are sufficient to plead interference with a political right. *See Assocs. in Obstetrics & Gynecology*, 270 F. Supp. 2d at 655 ("Plaintiffs allege that the Township enforced the zoning laws against it solely because it was an abortion provider . . . suffice for purposes of Defendants' Rule 12(b)(6) Motion."); *Sutton v. Chanceford Twp.*, No. 14-1584, 2016 U.S. Dist. LEXIS 172446 (M.D. Pa. Dec. 14, 2016) (denying motion to dismiss substantive due process claim because "plaintiffs have alleged facts to support their claim that the Township was motivated to deny their application by an animus toward constitutionally protected [First Amendment] conduct").

It is also sufficient to meet the conscience-shocking standard that Plaintiff has pled "corruption and self-dealing." *See Ecotone Farm LLC*, 639 F. App'x at 126 (reversing dismissal of substantive due process claim where plaintiff alleged officials abused "government positions to harass . . . and obstruct full enjoyment of their land . . . [in] their own private interests . . . . **These accusations rise above the mere allegation of 'improper' motive and depict corruption and repeated abuse of government power with the deliberate aim of harming someone. They are conscience-shocking and sufficient to sustain a substantive due process**

claim at the pleadings stage." (emphasis added));

Even at the summary judgment stage where the standard of review differs, the facts in the Complaint would create triable issues of fact. *See Schan*, 144 F. App'x at 209 (reversing summary judgment on substantive due process claim because there were genuinely disputed facts regarding whether municipality granted and then reconsidered permits for political benefit); *Hankin Family P'ship v. Upper Merion Twp.*, No. 01-1622, 2012 U.S. Dist. LEXIS 1471, at *63 (E.D. Pa. Jan. 5, 2012) (denying summary judgment because "a genuine issue of material fact exists as to whether Defendants acted with deliberate indifference, arbitrariness, or an intent to harm the rights of Plaintiffs" where there was evidence of self-dealing in Board of Supervisors' aim to depress value of plaintiffs' property and thus attract developer to create a golf course); *Willow Creek Winery, Inc. v. Borough of W. Cape May*, No. 12-6329 (NLH), 2015 U.S. Dist. LEXIS 173594, at *7 (D.N.J. Dec. 30, 2015) (denying summary judgment on substantive due process claim where mayor with adjacent property to winery development that threatened mayor's income intervened with local officials stating, "I want them shut down," "find a problem" and to make the construction "as difficult as possible," **because self-dealing created jury question of whether it "shocked the conscience"** (emphasis added)); *Frompovicz v. Twp. of S. Manheim*, No. 06-2120, 2007 U.S. Dist. LEXIS 74361, at *36-37 (M.D. Pa. Oct. 4, 2007) (denying dismissal because **"[i]f plaintiff can prove, as he alleges that defendants [acted] 'recklessly, intentionally, deliberately . . . for personal reasons unrelated to the merits of the proposed use of the property . . .' [h]e will have demonstrated that public corruption prevented him from using his property as he intended. This sort of official conduct, if proved, would constitute behavior that 'shocks the conscience.'"** (emphasis added)).

The corruption of Mayor Fulop is no less wrongful because money did not change hands.

"'Corruption' broadly refers to an abuse of public trust." *Khudaverdyan v. Holder*, 778 F.3d 1101, 1108 (9th Cir. 2015). As the Ninth Circuit has explained, "[i]n common parlance, as well as in precedent [borrowed from the asylum context], **'corruption' means a lack of integrity and a use of a position of trust for dishonest gain, which need not be financial.**" *Id.* at 1108 n.5 (emphasis added) (citing *Regalado-Escobar v. Holder*, 717 F.3d 724, 729-30 (9th Cir. 2013)). In fact, it has been recognized that "[o]ne form of 'gain' is the maintenance of a position of authority." *Id.*

Here, Mayor Fulop was corruptly self-dealing for his own personal political gain to curry favor with his decidedly anti-Trump electorate by unfairly punishing Plaintiffs for their affiliation with a Republican administration and covering up his true motivations through the issuance of the fabricated Notice of Default. *See, e.g.*, Compl. ¶¶ 110 (alleging the "basis for default is an obvious pretext orchestrated by Fulop, through his appointed representatives on the JCRA, to achieve his political goal of harming the Kushner family and to curry favor with his decidedly anti-Trump electorate.").

iv. Defendants' Arguments Concerning Their Conduct Should be Rejected as They Seek to turn the Standard of Review on a Notice to Dismiss Upside Down by Asking the Court to Impermissibly Weigh and Evaluate the Facts Pleaded

Apparently forgetting that this is a motion to dismiss requiring that all of the allegations of the Complaint, together with reasonable inferences therefrom, must be accepted as true, the Defendants attempt to factually dispute their plainly-pretextual Notice of Default (City Br. 23). The Complaint sets forth in great detail how the Notice of Default was "frivolous and legally unsupportable." Compl. ¶¶ 98-125. As summarized in ¶98 of the Complaint:

> Fulop's political animus towards JSP and the Kushner family culminated in the JCRA's service of the Notice of Default to JSP on about April 17, 2018. See annexed Exhibit D. The Notice of Default contains knowingly

> false statements, is nothing short of frivolous, and is a transparent pretext to enhance Fulop's status among the electorate of the City. Fulop orchestrated the Notice of Default, conspiring with the City entities he controlled, in an attempt to push the Kushner family out of the Project, following his candid acknowledgement on January 10, 2018, that the "problems" with the Project would go away if Kushner Companies was no longer involved with JSP.

Recognizing that the foregoing basis for the motion is meritless, the Defendants next argue that even if Fulop did "renege on the Redevelopment Agreement because of Jared Kushner's association with President Trump" this abuse of power under color of law is nothing more than "improper motive" and is not "conscience shocking." *See* City Br., pp. 23-24. However, Defendants acknowledge that the issue of "conscience-shocking behavior" has been recognized in the Third Circuit to include "corruption, self-dealing, bias against an ethnic group, or similar facts." City Br. 24 (citing *Eichenlaub*, 385 F.3d at 286). Thus, "corruption," "self-dealing," and "bias" or "similar facts" create an ultimate fact question to be resolved regarding the Defendants' conduct. Defendants ignore that the detailed facts set forth in the complaint, if accepted as true, set forth a classic case of self-dealing and corruption by a government official. Here, Fulop issued the fabricated Notice of Default to deprive Plaintiffs of their property rights in order to benefit himself politically. Do Plaintiffs mean to suggest to the Court that if a governmental official destroys a party's contractual rights, real property rights and causes a forfeiture of $55 million in order to curry political favor with residents by fabricating grounds for issuance of a Notice of Default that such conduct would not "shock the conscience?" If this is not sufficient to meet the "shock the conscience" standard at the pleading stage, it is difficult to image what would be. While relying upon the Third Circuit Decision in *Eichenlaub*, Defendants ignore the Court's admonishment "that [the shocks the conscience] test, of course, is not precise" in that it "varies depending on the factual context." *Id.* at 285. Even the *Eichenlaub* Court grappled with the "shocks the conscience" standard, citing to the Fifth Circuit Decision in

Conroe Creosoting v. Montgomery County, 249 F.3d, 337 (5th Cir. 2001) where the Court found a substantive due process violation properly pleaded. The facts in that case carried a whiff of "self-dealing" where the plaintiff had charged government officials with converting a tax levy deficiency into a seizure and forced sale, causing the destruction of an ongoing business. *Eichenlaub*, 385 F. 3d at 285 (citing *Conroe Creosoting*, 249 F. 3d, 337-340). The *Eichenlaub* Court contrasted *Conroe Creosoting* with the commonplace zoning disagreement that was presented to the court in that case. *Id.* Here, the Complaint sets forth facts supporting "conscience shocking behavior" in the form of corruption, self-dealing, bias, or "similar facts" more compelling than even *Conroe Creosoting*.

The Civil Rights Act was created to look beyond the often invidious manner through which government officials will violate Constitutional rights. Application of the foregoing principles to the allegations in the Complaint compel the conclusion that Defendants' Motion to Dismiss the substantive due process claim in the Complaint must be denied.

V. DEFENDANTS' MOTION TO DISMISS THE PROCEDURAL DUE PROCESS CLAIM BASED UPON THE ALLEGATION THAT THE REDEVELOPMENT AGREEMENT DOES NOT CONSTITUTE A PROTECTED "PROPERTY INTEREST" MUST BE DENIED AS (A) DEFENDANTS' PURPORTED TERMINATION OF PLAINTIFFS' FEE INTEREST AND OBSTRUCTION OF ITS USE AND ENJOYMENT OF THEIR LAND FOR AN APPROVED USE CONSTITUTES A VALID PROPERTY INTEREST NOT EVEN ADDRESSED IN DEFENDANTS' MOTION, AND (B) PLAINTIFFS HAVE A SEPARATE PROPERTY INTEREST IN THE REDEVELOPMENT AGREEMENT WHICH CAN ONLY BE TERMINATED BASED UPON AN "ENUMERATED EVENT OF DEFAULT" WHICH DOES NOT EXIST.

"The root requirement of the Due Process Clause is that an individual be given an opportunity for a hearing before he is deprived of any significant protected interest." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (internal quotations omitted). In a claim alleging violation of "procedural due process, [the court] employ[s] the familiar two-stage analysis, inquiring (1) whether the asserted individual interests are encompassed within the fourteenth amendment's protection of life, liberty, or property; and (2) whether the procedures available provided the plaintiff with due process of law." *Alvin v. Suzuki*, 227 F.3d 107, 116 (3d Cir. 2000) (internal citations and quotation marks omitted). Defendants have contested solely the first element, whether Plaintiffs pled a protected property interest. City Br. 18.

Defendants collectively contend that there can be no procedural due process claim because Plaintiff has not "properly claimed a protected property right under the 14th Amendment." Fulop Br. 10; City Br. 18. In substance, they contend that the completely pretextual Notice of Default which effectively impairs Plaintiffs' ability to develop the Project after spending $55 million and which would ultimately result in the loss of the real property by Plaintiffs does not constitute a deprivation of property rights. The essence of the meritless argument is that the Redevelopment Agreement should be interpreted as having a "termination for convenience" clause which effectively, according to the Defendants, means that Defendants

had a right to terminate in their "sole discretion" and not based on "cause." Of course, Defendants fail to explain why if they had a right to terminate for cause, they issued a Notice of Default based upon "cause" based on specific provisions of the Agreement. As shall be set forth below, this argument is as meritless as (1) Defendants ignore the land itself which is subject to forfeiture based on the Redevelopment Agreement and (2) that under settled law, obstruction of Plaintiffs' use and enjoyment of the property for a duly-approved purpose constitutes a protectable property interest.

A. Plaintiffs Have Stated Valid Property Interests In Both (1) Defendant's Purported Termination of Plaintiffs' Ownership And Rights in The Fee Interest Itself, and (2) Defendants' Obstruction Of Plaintiffs' Use And Enjoyment Of Their Real Property For A Duly Approved Purpose

The wrongful conduct of Defendants in issuing the pretextual notice motivated by political considerations rather than facts ignores once simple fact: Plaintiffs are the owners of the underlying real property which is the subject of this Development. Plaintiffs have expended $55 million to redevelop and improve the real property. Pursuant to § 8.4 of the Redevelopment Agreement, the issuance of the Notice allows the Defendants to dramatically interfere with, and deprive, Plaintiffs of their property rights, including the following:

- To enter and take possession of the Project premises;
- To demand Plaintiffs execute and deliver a Deed to the Project premises;
- Defendants have a claimed right to execute and deliver a Deed for the Project premises to the JCRA pursuant to a purported right as attorney-in-fact;
- Resale of the Project premises, thus, completely depriving Plaintiffs of their rights in the real property.

The issuance of the fabricated Notice of Default has caused Plaintiffs' lender to serve a Notice of Default on a $57 million bridge loan needed to support the Project, thus, interfering with any ability to proceed forward with the Project. Compl., ¶113. Defendant, Fulop, has

announced the true motivation behind the fabricated Notice of Default, which was to "move to a different partner that can complete the Project." Compl., ¶113.

Moreover, "the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money." *Bd. of Regents v. Roth*, 408 U.S. 564, 571-72 (1972). In addition to the ownership of real property, a "person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing." *Perry v. Sindermann*, 408 U.S. 593, 601 (1972). For example, a property interest may "be created by ordinance, or by an implied contract." *Bishop v. Wood*, 426 U.S. 341, 344 (1976). A state actor may also induce reliance, creating a property interest: "[e]xplicit contractual provisions may be supplemented by other agreements implied from the promisor's words and conduct in the light of the surrounding circumstances." *Perry*, 408 U.S. at 602.

Plaintiffs plead a specific and detailed plan for development and use of the property. Compl. ¶ 1 (describing planned development and site plans). Thus, in addition to depriving Plaintiffs of title to the property itself, Defendants have also obstructed Plaintiffs' planned use of the property by blocking all further development. Compl. ¶¶ 115-117. In the Third Circuit, the due process clause is violated both where—as here—a governmental decision deprives the landowner of title, and also where it "impinges upon a landowner's use and enjoyment of property . . . the plaintiff has, as a matter of law, impliedly established possession of a property interest . . . ." *DeBlasio v. Zoning Bd. of Adjustment*, 53 F.3d 592, 600 (3d Cir. 1995), *mod. on other grounds by UA Theatre Circuit v. Twp. of Warrington*, 316 F.3d 392 (3d Cir. 2003). Similarly, a governmental decision that deprives a party of exercising property rights arising from duly obtained permits and approvals to develop land states a property interest. *Enters. v.*

Pittsburgh Water & Sewer Auth., 103 F.3d 1165, 1179 n.12 (3d Cir. 1997) ("[Z]oning decisions, building permits, or other governmental permission required for some intended use of land owned by the plaintiffs . . . implicat[e] the 'fundamental' property interest in the ownership of land."). Plaintiffs hold multiple valid governmental approvals (supported by testimony of Defendants) from the planning departments of Jersey City and Hudson County, but Defendants have now obstructed Plaintiffs from proceeding with development as approved, solely for pure political purposes. Compl. ¶¶ 47, 50, 53 (setting forth planning board approvals in multiple municipalities).

These interests, which Defendants do not contest in their motion, constitute a sufficient "property" interest to state a claim in and of themselves. *See Providence Pediatric Med. Daycare, Inc. v. Alaigh*, 799 F. Supp. 2d 364, 376 (D.N.J. 2011) (denying motion to dismiss because "[i]t is plausible that Plaintiffs may have a property interest in their PMDC licenses or the ownership and use of their physical facilities . . . the Court, without more, cannot be sure that absolutely no property interest has been articulated in this matter that would warrant due process of law.").

B. Moreover, Plaintiffs Have A Separate Property Interest In The Redevelopment Agreement, Which May Only Be Terminated Upon Proof Of An Enumerated "Event Of Default," Not "At Will" On Defendants' Whim

While ignoring the facts and legal principles in Point IV(A) above, Defendants' sole argument in support of their claim of no "property interest" is their baseless claim that the Redevelopment Agreement is purportedly not a protectable interest because it is allegedly "terminable at will." City Br. 18; JCRA Br. 14; Fulop Br. 11-12. In making this argument, Defendants ignore the actual language of the contract, pretend, without any support, that the contract may be terminated for "convenience" and fail to explain why, if the contract was

"terminable at will," Defendants issued a Notice terminating for cause based upon their meritless claim of lack of performance.

"[I]t is beyond dispute today that a contract with a state entity can give rise to a property right protected under the Fourteenth Amendment." *Linan-Faye Constr. Co. v. Housing. Auth.*, 49 F.3d 915, 931 (3d Cir. 1995). Indeed, each of the Defendants admits that a contract which is terminable only "for cause" satisfies this due process element. *See* Fulop Br. 12 ("[A] property interest arises where the contract itself includes a provision that the state entity can terminate the contract only for cause."). Only a contract which is held as a matter of law to be terminable at will, without cause, and for merely a party's convenience, lacks a property interest. *See Cleveland Bd. of Educ.*, 470 U.S. at 543. Defendants cite to *Linan-Faye*, where the Court held there was no property interest because the contract had a "convenience clause" permitting the state to "terminate the contract for reasons other than for cause" including mere "convenience," which was essentially terminable "at will." 39 F.3d at 932. Unlike *Linan-Faye*, here, it is undisputed that the Redevelopment contains no "convenience clause." Instead, the Redevelopment Agreement cannot be terminated "at will," but only upon an enumerated "Event of Default." Specifically, the Redevelopment Agreement provides the following provisions as a basis for termination:

> **Upon the occurrence of any Event of Default**, subject to the rights of any mortgage holder as set forth in Sections 7.04 and 7.05 herein, the Agency shall have the right at its sole and absolute discretion, upon ninety (90) days' notice to Redeveloper and any mortgagee of the Redeveloper, to enter and take possession of the Project Premises. At the same time that the Agency enters onto and takes possession of the Project Premises, Redeveloper shall execute and deliver a deed to the Agency for the Project Premises subject to the rights of any mortgage holder as set forth in Article VII herein. . . **Upon the occurrence of any such conveyance, this Agreement shall be deemed terminated** and there shall be no further rights or obligations of the parties except for those rights reserved to a mortgage holder or as otherwise expressly set forth in this Article VIII.

Compl. Ex. A, § 8.04 (emphasis added). An "Event of Default" includes express limited circumstances, *id.* § 4.01(b), each of which require a finding that Plaintiffs have "violate[d]" its "obligations hereunder," *id.* § 8.01. Defendants cannot terminate the Redevelopment Agreement at will for any reason or no reason at all, rather they must identify and prove a violation of Plaintiffs' "obligations" sufficient to constitute an "Event of Default," and upon notice with request to cure, before terminating the agreement.[6] The requirement of identifying a violation and providing notice is "antithetical to the very definition" of an at-will contract. *Carlson v. Arnot-Ogden Mem'l Hosp.*, 918 F.2d 411, 414 (3d Cir. 1990). The provisions of the Redevelopment Agreement permit termination only "for cause," thus creating a protected property interest.

Defendants respond, without any legal citation, that because the Redevelopment Agreement purportedly confers "discretion" in JCRA with respect to contract *deadlines*, such alleged discretion somehow means they can elect contract *termination* at will. *See* City Br. 20. Importantly, Defendants had absolutely no discretion to refuse to extend deadlines, because the Agreement mandated cooperation in revising construction timetables, and additional extension periods which could not be "unreasonably denied, delayed or withheld" by the JCRA. (Compl. ¶ 42). But regardless, even if Defendants possessed some minimal control over the timing of extensions, the Agreement most certainly did not confer the unilateral authority to terminate the agreement at will. Furthermore, as Plaintiffs' pled in the Complaint, the initial deadline following obtaining governmental approvals on February 20, 2018, does not expire until February 14, 2019 pursuant to the 180 day contingency period and automatic extension. Compl.

[6] Putting aside the plain language of the Agreement, can anyone argue with a straight face that a party investing $55.0 million in a project with the risk of loss of its property, would ever agree to allowing the contract to be terminated for "convenience" or "at will"?

¶ 48. Defendants' purported "discretion" to extend deadlines is utterly irrelevant when the deadline had not yet occurred as of the date of the Notice.

Separate from the Redevelopment Agreement, Plaintiffs were designated as redeveloper by duly enacted ordinance, with the corresponding right to develop the property. An ordinance creates a property interest if it created an expectation in a benefit. *Perri v. Aytch*, 724 F.2d 362, 364 (3d Cir. 1983) (holding an ordinance requiring six-month delay created property interest because it "grant[ed] an employee an expectation interest in continued employment during the six-month probationary period."). Defendants respond by citing a single unpublished decision holding that the specific redevelopment ordinance in that case did not confer an "irrevocable" right. *Rodriguez v. Fajardo*, Civ. No. 06-4996, 2007 U.S. Dist. LEXIS 48217, at *23-24 (D.N.J. July 3, 2007). This authority lends no weight to the analysis here because the Court in *Rodriguez* did not suggest in any way that designation as redeveloper could never confer a protectable interest, only that the particular ordinance—the language of which the court omitted—did not state a sufficient interest.

Finally, Plaintiffs pled that they relied upon the City's repeated and express representations that it would assist in obtaining governmental approvals, financing, and tax abatements, similar to the two previous owners of the project, and consistent with Jersey City's vision of the project being a public/private venture. Compl. ¶¶ 30, 37. Indeed, Fulop induced Plaintiffs to pay $2.5 million in expectation of those benefits after the purported date of non-performance. Compl. ¶ 49. This mutual understanding is sufficient to create a property interest. *Perry*, 408 U.S. at 599 (finding property interest through assurances of state actor, even where not contained in contract, because "this interest, though not secured by a formal contractual

tenure provision, was secured by a no less binding understanding fostered by the college administration").

C. Defendant Provided No Predeprivation Process

Without any legal analysis whatsoever, the JCRA includes a single sentence that the "procedures available" were constitutionally sufficient, providing neither citation to the record nor identification of what procedures were purportedly sufficient. JCRA Br. 14. The threadbare assertions that an element is lacking is insufficient to raise an issue before the Court. *See Laborers' Int'l Union of N. Am., AFL-CIO v. Foster Wheeler Energy Corp.*, 26 F.3d 375, 398 (3d Cir. 1994) ("[A] passing reference to an issue . . . will not suffice to bring that issue before this court.") (internal quotation marks omitted); *John Wyeth & Bro. Ltd. v. CIGNA Int'l Corp.*, 119 F.3d 1070, 1076 n.6 (3d Cir. 1997) (finding "arguments raised in passing . . . but not squarely argued, are considered waived.").

Regardless, whatever post-deprivation process Defendants claim existed are not constitutionally sufficient because only pre-deprivation process is adequate. "[T]he Court usually has held that the Constitution requires some kind of a hearing *before* the State deprives a person of liberty or property." *Zinermon v. Burch*, 494 U.S. 113, 127 (1990) (emphasis in original). Thus, Defendants' deprivation of Plaintiffs' procedural process was "complete at the moment [they were] deprived of a liberty or property interest without being afforded the requisite process." *Burns v. Pa. Dep't of Corr.*, 544 F.3d 279, 284 (3d Cir. 2008). The only exception, not invoked by Defendants, is where the deprivation was "random" or "unforeseeable," rendering a pre-deprivation hearing impossible. *See Hudson v. Palmer*, 468 U.S. 517, 532-33 (1984) ("[I]t is difficult to conceive of how the State could provide a meaningful hearing before the deprivation . . . [when] it is not only impracticable, but impossible."). But high level policy-

making—such as Mayor Fulop's action here—is not random or unauthorized as a matter of law, requiring pre-deprivation process. *See Zinermon v. Burch*, 494 U.S. 113, 115 (1990) (refusing to consider defendant's post-deprivation remedies because the conduct of high-level officials during pre-deprivation procedures was foreseeable and could therefore not be considered "random" or "unauthorized" within the meaning of *Parratt-Hudson* exception); *Berlanti v. Bodman*, 780 F.2d 296, 301 (3d Cir. 1985) (finding official's declaration of "town's policy" is not considered "random" or "unauthorized" and requires pre-deprivation procedures); *DiBlasio v. Novello*, 344 F.3d 292 (2d Cir. 2003) (requiring predeprivation hearing "where the government actor in question is a high-ranking official with final authority over significant matters."). Thus, "notwithstanding the availability of state judicial routes as well," Defendants were required to provide a pre-deprivation hearing before depriving Plaintiffs of their protected property interest. *Berlanti*, 780 F.2d at 301 (finding Secretary of Labor's act of barring plaintiff from government contract required pre-action hearing). They did not. Defendants' argument must therefore be denied.

VI. PLAINTIFFS' COUNT SIX ADEQUATELY PLEADS AN EQUAL PROTECTION CLAIM FOR HAVING BEEN TREATED DIFFERENTLY FROM THOSE SIMILARLY SITUATED AS A "CLASS OF ONE."

Plaintiffs have sufficiently pleaded a claim for equal protection. Equal protection suits under a "class of one" theory are appropriate where "it appears that an individual is being singled out by the government such that the specter of arbitrary classification is fairly raised." *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 602 (2008). Plaintiffs have made out the required elements of this claim in that: "(1) the defendant[s] treated [Plaintiffs] differently from others similarly situated, (2) the defendant[s] did so intentionally, and (3) there was no rational basis for the difference in treatment." *Hill*, 455 F.3d at 239.

At the pleadings stage, Plaintiffs are not required to identify with specificity the similarly situated parties or how they have been treated differently. *See Phillips*, 515 F.3d at 244 ("[Supreme Court precedent] does not establish a requirement that a plaintiff identify in the complaint specific instances where others have been treated differently for the purposes of equal protection"); *M.G. v. Crisfield*, 2009 U.S. Dist. LEXIS 83419, at *14 (D.N.J. Sept. 11, 2009) ("The Third Circuit has held that a plaintiff is not required to specifically identify the similarly situated persons."). Here, however, Plaintiffs have, including but not limited to other developers in the Journal Square 2060 Redevelopment Area and the prior developers of this very same property – for which there could, perhaps, not possibly be a more "similarly situated" basis for comparison. *See, e.g.*, Compl. ¶¶ 20-22.

As to the second element, Plaintiffs have surpassed the minimum requirement of generally alleging intent to treat parties differently. *See* Fed. R. Civ. P. 9(b) ("Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."); *Thomas v. Coopersmith*, 2012 U.S. Dist. LEXIS 118747, at *14 (E.D. Pa. Aug. 20, 2012) (finding intent was sufficiently pled where the plaintiff alleged that the disparate treatment by police was motivated by their friendship with his neighbor (with whom he was in a dispute)). Plaintiffs have met this requirement by setting forth detailed allegations of intent in identifying pronouncements by, and discussions involving, Mayor Fulop that reveal his contemptuous and intentionally unfair treatment of Plaintiffs that are contrary to the public's well-documented interest in development of this area. *See*, *e.g.*, Compl. ¶ 12.

As to the third element, Plaintiffs' have pled a lack of rational basis for the disparate treatment to demonstrate that Mayor Fulop and the other Defendants irrationally interfered with Plaintiffs' development of One Journal Square, unlike other projects in the Journal Square 2060

Redevelopment Area, as a proxy for attacking the Trump Administration for Fulop's own selfish political benefit. This is supported by the facts alleged in the Complaint and is legally sufficient for pleading purposes. *See Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1176 (3d Cir. 1986) (reversing dismissal of news agency's claim that government permitted access to information only "to those favorably disposed to it while denying access to those whom it considers unfriendly"); *Hilton v. City of Wheeling*, 209 F.3d 1005, 1008 (7th Cir. 2000) (holding that there is no rational basis for differential treatment based on "reasons of a personal nature unrelated to the duties of the defendant's position"). Here, the Mayor's decision to target Plaintiffs based on political animus and to garner favor from the Trump Administration's outspoken critics, is wholly arbitrary and not rationally linked to legitimate governmental objectives. *See Versaggi v. Twp. of Gloucester*, 2005 U.S. Dist. LEXIS 30241 (D.N.J. Nov. 28, 2005) (denying motion to dismiss when plaintiff alleged different treatment based upon nepotism); *Hankin Family P'ship*, 2012 U.S. Dist. LEXIS 1471, at *63 (denying summary judgment where evidence showed plaintiff property owner was denied variance because zoning board wanted a golf course at that location); *Thomas v. Coopersmith*, 2012 U.S. Dist. LEXIS 118747, at *14 (difference in treatment due to another's friendly relationship with decision-maker); *Jannuzzi v. Borough of Edwardsville*, 2009 U.S. Dist. LEXIS 106166, at *9 (M.D. Pa. Nov. 13, 2009) (denying a motion to dismiss where the plaintiffs alleged they were treated differently because of "personal animus"); *see also Cordeco Dev. Corp. v. Vasquez*, 539 F.2d 256, 260 (1st Cir. 1976) (finding an equal protection violation where a plaintiff's sand extraction permit application was treated differently because "plaintiff's application was opposed by the politically influential Abreu family which owned the five adjacent parcels [compared to]

[Plaintiff] Cordero's own lack of political influence."). Despite Defendants' naked denials of an improper purpose, Plaintiffs' allegations satisfy the notice pleading standard.

The Defendants, ignoring the facts in the Complaint, claim that Plaintiffs have not adequately pleaded a claim for equal protection, arguing that "Plaintiffs fail to present any example where a similarly-situated developer was treated differently." JCRA Br. 15. They conveniently ignore the following facts in the Complaint:

- Pursuant to Ordinances 08-164, 08-165 and 08-166, on November 25, 2008, the city approved MEPT's application for a 30 year tax abatement for the exact same project but here taken over by Plaintiffs. Thus, when Plaintiffs took over the Project, tax abatements had already been issued to MEPT. (Compl. ¶ 20)

- Other developers in Journal Square were also granted favorable tax abatement packages from the City. (Compl. ¶ 20)

- For over the last 10 years, the Defendants approved similar tax abatement applications for virtually every major development project in the City. (Compl. ¶ 21)

- At the time the parties negotiated and entered into the Redevelopment Agreement the City's "policies and guidelines" promoting the approval of PILOTS and RABS in connection with the redevelopment projects in Journal Square was firmly established.

- As a result of this, the Redevelopment Agreement, in ¶4.01(d) conditions obligations under the contract upon receipt of approval "of a long-term tax exemption from the City" and specifically obligated such approval. (Compl. ¶ 41)

- The contractual commitment was consistent with the existing policies of the City, confirmed by Fulop's Executive Orders, which mandated that tax abatements be granted if the criteria in the guidelines were met. (Compl. ¶ 41)

- Fulop's own Executive Order mandated that an application for tax abatement would receive "Mayoral recommendation and should be approved by the Council."

- At a meeting on January 10, 2018, Fulop confirmed that with respect to Plaintiffs' request for tax abatements, which were contemplated by the Redevelopment Agreement and his Executive Orders, it would be "blatant discrimination" to refuse to provide tax abatements to Plaintiffs, particularly

> since the prior developer of the same property was granted same and all other developers similarly situated were provided with such abatements. (Compl. ¶ 86).

Defendants' only other argument is that since Plaintiffs have alleged that real estate is "unique" as a necessary element of a claim for specific performance, that Plaintiffs could not be in the "same class" as any other party. City Br. 13. Of course, it is well settled law that real estate is deemed to be unique as a legal matter within the analytical framework of the doctrine of specific performance. However, the Complaint pleads in great detail, as set forth above, more than adequate facts demonstrating that Plaintiff has been treated in a fundamentally different way from other developers in Jersey City similarly situated. Indeed, the prior developer, MEPT, from whom Plaintiffs acquired the property, had received tax abatements for the Project, as have myriad others in the Journal Square Redevelopment Area. Indeed, as alleged in the Complaint, Fulop refused to even consider the application, even though he was required by law to submit the application with the recommendation, pursuant to N.J.S.A. § 40A:20-8. His failure to do so further supports the allegations in the Complaint that he failed to treat Plaintiffs in a manner consistent with the treatment of all other developers who made application, both within Journal Square and without. Compl. ¶ 95.

VII. PLAINTIFFS' COUNT SEVEN ADEQUATELY PLEADS RETALIATION FOR FREE SPEECH.

Plaintiff has adequately made out a claim under Count VII for retaliation based on the exercise of free speech under the First Amendment. "The Supreme Court has frequently declared that the very core of the First Amendment is that the government cannot regulate speech 'because of its message, its ideas, its subject matter, or its content." *Startzell v. City of Philadelphia,* 533 F.3d 183, 192 (3d Cir. 2008) (internal quotation omitted). "Except for certain narrow categories deemed unworthy of full First Amendment protection – such as obscenity,

'fighting words' and libel -- all speech is protected by the First Amendment. That protection includes private expression not related to matters of public concern." *Eichenlaub*, 385 F.3d at 284 (internal citations omitted) (holding land owner's speech about zoning dispute, even though it concerned private grievances, was entitled to First Amendment protection). Of special importance here, supporting a candidate's election is protected speech. *See Brown v. Hartlage*, 456 U.S. 45, 53 (1982) ("The candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election and the election of other candidates.").

Plaintiff has stated a retaliation claim under the First Amendment because it has alleged: (1) constitutionally protected conduct, (2) retaliatory action sufficient to deter a person of ordinary firmness from exercising his constitutional rights, and (3) a causal link between the constitutionally protected conduct and the retaliatory action." *Thomas v. Independence Twp.*, 463 F.3d 285, 296 (3d Cir. 2006).

As to Defendants' contention that there is not any constitutionally protected speech, the facts in the Complaint show otherwise. Aside from the widely-known close familial and professional relationship between Jared Kushner and the Trump family, numerous media outlets reported that the Kushner family held political fundraising for then-candidate Trump in the 2016 election cycle.[7] The political support by the Kushner family for President Trump (aside from Jared Kushner's own individual support) would undeniably constitute protected First Amendment speech – and certainly would fulfill this element at the pleading stage. Defendants' argument that Count VII (Free Speech Retaliation) is deficient as to "constitutionally protected

[7] *See, e.g.*, B. Johnson, *Donald Trump makes campaign appearance at Jersey Shore*, NJ.com (Aug. 24, 2015), *available at* http://www.nj.com/politics/index.ssf/2015/08/donald_trump_makes_appearance_at_jersey_shore.html (last accessed Dec. 3, 2018) (reporting campaign "meet-and-greet at the Long Branch seaside home of Seryl and Charles Kushner, the in-laws of Trump's daughter Ivanka"). The Court may take judicial notice of this publicly available document.

conduct" relies upon the same straw-man argument manufactured to assert lack of standing.[8] In particular, the City misframes Plaintiffs' claims as "solely and exclusively" personal to non-party Jared Kushner because of his political activities. But this argument naively ignores political and cultural realities. Mayor Fulop's outward pronouncements indicate that he considers Jared Kushner, as former CEO of the Kushner Companies, to be representative of Plaintiffs. The same is true of Jared Kushner's family members who continue to own and run the Kushner Companies, and are heavily involved in Plaintiffs' development of One Journal Square. Here, the pleadings plainly allege that Plaintiffs are suffering illegal retaliation for the associations and activities of Jared Kushner and the Kushner family in the exercise of their right of political expression. *See* Compl. ¶¶ 170-71.

As to the second element—the retaliatory action sufficient to deter—the fabricated Notice of Default and discriminatory conduct regarding tax abatements easily satisfies this requirement. "[W]hether a retaliatory campaign of harassment has reached the threshold of actionability under § 1983" is a **fact question**. *Thomas v. Independence Twp.*, 463 F.3d at 296 (denying motion to dismiss). It is irrelevant whether the Plaintiffs have been subjectively deterred in their political speech, because analysis of whether the retaliatory action was sufficient to "deter a person of ordinary firmness" is "an objective question." *Mirabella v. Villard*, 853 F.3d 641, 650 (3d Cir. 2017). The Third Circuit has recognized that this "deterrence threshold" is "very low" – such that it is relatively easily satisfied. *O'Connor v. City of Newark,* 440 F.3d 125, 128 (3d Cir. 2006) ("A First Amendment retaliation claim will lie for any individual act which meets this 'deterrence threshold,' and that threshold is very low . . . a cause of action is supplied by all but truly *de minimis* violations."); *Suppan v. Dadonna*, 203 F.3d 228, 235 (3d

[8] We incorporate and adopt those arguments in Point II(B) above that address the issue of the standing of Plaintiffs to assert injury for retaliation against employees.

Cir. 2000) ("[S]ince there is no justification for harassing people for exercising their constitutional rights it need not be great in order to be actionable.") (quoting *Bart v. Telford*, 677 F.2d 622 (7th Cir. 1982)). The low threshold was underscored when the Supreme Court noted that "even an act of retaliation as trivial as failing to hold a birthday party for a public employee . . . when intended to punish her for exercising her free speech rights" is sufficient to deter the exercise of constitutional rights. *Rutan v. Republican Party*, 497 U.S. 62, 75 n.8 (1990).

Here, in the development context, a government's termination of a $900 Million Project in retaliation for protected speech constitutes actionable retaliation. Indeed, in another matter it was held sufficiently retaliatory for a township to issue a "no contact" direction to a property-owner as punishment for protected conduct to violate Plaintiffs' Civil Rights. *Mirabella*, 853 F.3d at 647. There, a plaintiff property owner engaged in protected speech, and, in retaliation, was then ordered by the Chairperson of the Board of Supervisors to "never contact me, the Board of Supervisors or the Township employees directly." *Id.* The Third Circuit held "[t]his prohibition was 'sufficient to deter a person of ordinary firmness from exercising his constitutional rights.'" *Id.* at 650; *see Eichenlaub*, 385 F.3d at 282 (reversing summary judgment where developer claimed retaliation against planned development in response to protected speech).

Despite those controlling legal principles, remarkably, the Defendants' only argument is that they contend that there was no retaliation because it cancelled the Redevelopment Agreement due to Plaintiffs breaching it. City Br. 15. This contesting of the factual allegations in the Complaint is clearly improper on a motion to dismiss. As noted above, Plaintiffs have pled ample details indicating the politically retaliatory nature of the fabricated Notice of Default

– including but not limited to Fulop's own tweets. The City's argument does nothing more than raise trial issues of fact.

As to the requisite causal connection between the protected conduct and the retaliation—Plaintiff has clearly pled facts on this point that the Defendants baselessly characterizes these allegations as "bluster." City Br. 15. What Defendants characterize as "bluster" are Mayor Fulop's unrestrained public pronouncements via Twitter that provide a candid glimpse into his political animus and improper motives. *See, e.g.*, Compl. ¶ 92 (stating on Twitter on January 24, 2018 that "I suspect it's DOA"); Compl. ¶ 94 ("On April 17, 2018, [Fulop] arrogantly tweeted that there is a 'sense of entitlement that the developer has towards a subsidy.'"). The facts pleaded have presented more compelling direct evidence of political animus and personal bias than is typically available at this early stage to the average plaintiff alleging violations of constitutional rights. *See, e.g.*, *Moore v. City of Philadelphia*, 461 F.3d 331, 343 (3d Cir. 2006) (observing the difficulty of obtaining evidence of improper motive in stating "[w]e find it difficult to imagine a Title VII plaintiff producing stronger evidence of retaliatory animus than Carnation's account of his conversation[.]"); *Abramson v. William Paterson College*, 260 F.3d 265, 278 (3d Cir. 2001) ("We have also noted that because discrimination is 'often simply masked in more subtle forms,' it is often difficult to discern discriminatory animus."). Sophisticated violators of constitutional rights under color of law typically use cunning and misdirection to obscure their improper purpose. *See Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1082 (3d Cir. 1996) (noting in the racial discrimination context that "violators have learned not to leave the proverbial 'smoking gun' behind. As one court has recognized, 'defendants of even minimal sophistication will neither admit discriminatory animus or leave a paper trail demonstrating it.'").

Here, however, the Mayor's lack of restraint has largely unmasked his real objective: scoring public points against a political foe and his high-profile family. The City's argument that temporal proximity does not support the causal connection between Mayor Fulop's manuevering against the Plaintiffs' interests and the Kushner family's political activities is uncompelling given the alleged timeline of events. City Br. 15. That position ignores that the freezing-out of Plaintiffs was only complete after 15 months upon issuance of the Notice of Default in April 2018. Compl. ¶ 98 (Notice of Default was "culminat[ion]" of "Fulop's political animus"). As alleged in the Complaint, that freeze-out took shape when Mayor Fulop recognized his political gain in dealing arbitrarily with the Kushner family and secretly devised a way to orchestrate a slow-down and derailment of the Project. First, it was not until January 2017 that Jared Kushner's role in the presidential administration was publicly announced. Compl. ¶ 63. In May 2017, Mayor Fulop began vocally distancing himself—on Facebook—from Plaintiffs' application for tax credits on the One Journal Square project—which repudiated prior promises that the Defendants would support tax abatements. Compl. ¶¶ 72-73. Soon thereafter, Plaintiffs were told by City officials that it was politically undesirable to deal with tax abatement issues ahead of the November elections. Compl. ¶ 74. In September 2017—less than two months before Mayor Fulop was up for reelection—the JCRA cancelled a meeting with Plaintiffs regarding the Amended and Restated Redevelopment Agreement and cut off communications. Compl. ¶ 82. Plaintiffs attempted to advance the amended site plan application for much of 2017 in order to memorialize newly-agreed timetables. That amendment was approved on November 14, 2017 - just one week after Mayor Fulop was reelected. Compl. ¶ 84. Far from supporting Defendants' lack of temporal proximity thesis, this detailed timeline of events establish a calculated campaign to remove Plaintiffs from the Project that was fueled by political anumus for

Defendants' own selfish political gain. Accordingly, Plaintiffs have sufficiently pled the causal connection for retaliation for their exercise of First Amendment rights at the pleading stage.

VIII. PLAINTIFFS' COUNT EIGHT ADEQUATELY PLEADS RETALIATION FOR FREE ASSOCIATION.

Under the same legal framework as discussed *supra* concerning free speech, Plaintiffs have also stated a claim for retaliation based on free association protected by the First Amendment. As to Count VIII, the Defendants apply an incorrect view of free association retaliation legal principles, as well as an improper view of required standard of review of pleadings on a motion to dismiss. Contrary to Defendants' meritless contention that familial political relationships have no bearing on this case, the Third Circuit has observed that "[t]wo *sometimes overlapping types of protected association* have been recognized: associations founded on intimate human relationships in which freedom of association is protected as a fundamental element of liberty, and associations formed for the purpose of engaging in activities protected by the first amendment, such as the exercise of speech[.]" *Rode v. Dellarciprete*, 845 F.2d 1195, 1204 (3d Cir. 1988) (emphasis added).

Here, politics and family are plainly implicated here. The subject matter of the Complaint presents a case where politics and family have intersected on the national stage, and where unprecedented levels of incivility and political animus from certain quarters (*see* Compl. ¶¶ 1, 2, 7) towards the President have motivated a state actor to retaliate against Plaintiffs as a political proxy for Jared and Charles Kushner. This complex web of political and personal relationships at issue here simply cannot be unwound at the pleading stage. For Defendants to argue otherwise strains credulity.

While Defendants correctly identify Jared Kushner's relationship as being important to understanding Plaintiffs' free association claim, they mistakenly assess the significance. Jared

Kushner's relationship as (a) son-in-law and (b) Senior Advisor to the President is the reason why Fulop targeted Plaintiffs redevelopment project as a proxy for being seen to "resist" or visibly oppose the President and his close family member. The family and personal and political family connections between Jared Kushner and Plaintiffs cannot be seriously questioned. Nor can the political and personal connections between Jared Kushner and the President. While the Third Circuit in *Rode*, 845 F.2d at 1204 found a family relationship of a brother-in-law inadequate to serve as a basis for a free association claim, Jared Kushner's relationship to President Trump is much closer both personally and politically. Mr. Kushner is the President's son-in-law, father of the President's grandchildren and is his Senior Advisor at The White House. In *Rode*, the Court found that "[a]lthough the precise boundaries of this protection are unclear, it seems that at least some family relationships fall within its ambit." *Id.* With regard to family relationships, the *Rode* court also said that they "by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctly personal aspects of one's life." *Id.* The criteria as to whether "a particular association is sufficiently personal or private to warrant constitutional protection" depends on "factors such as size, purpose, selectivity, and the exclusion of others from the critical aspects of the relationship" *Id.* at 1204-05 (citing *Bd. of Directors of Rotary Int'l, et al. v. Rotary Club of Duarte*, 481 U.S. 537 (1987)). Certainly at the pleading stage, Jared Kushner and President Trump share the requisite level of "closeness." Under the Third Circuit's guidance, the relationship must be examined for its "relative smallness," and "a high degree of selectivity in decisions to begin and maintain the affiliation." Certainly, President Trump can be understood to have a high level of trust and confidence in his son-in-law, who has been a close personal advisor to the President. For the

foregoing reasons, Defendants' motion to dismiss the Free Association Claim must be denied as the Complaint adequately pleads a cause of action.

The Defendants also cite an out-of-district case, *Arneault v. O'Toole*, 864 F. Supp. 2d 361 (W.D. Pa. 2012) for the proposition that a plaintiff alleging a First Amendment violation "cannot rely on the speech of a third party." City Br. at 17. *Arneault*, however, is inapposite as it involved First Amendment claims asserted by a plaintiff who was directing corporate counsel to make four specific statements on behalf of corporate entities and petitions for redress. *Arneault* did not involve the type of family, political and business relationships here.

Moreover, Defendants' position entirely ignores that the Third Circuit, among others, allows for claims to be asserted for retaliation against third-parties for exercise of free speech where a close relationship exists between the speaker and a third-party. *Montone v. City of Jersey City*, 709 F.3d 181, 197 (3d Cir. 2013) ("[W]e adopt the reasoning . . . holding that a party has standing to bring an action for First Amendment political affiliation retaliation pursuant to § 1983, even where, as here, the alleged retaliation was directed towards another individual"); *see also, e.g.*, *Benison v. Ross*, 765 F.3d 649, 658 (6th Cir. 2014) (recognizing a First Amendment retaliation claim where a university took an adverse employment action against the plaintiff (a professor at the university) whose husband (a student at the university) had sponsored a no confidence vote against the provost and university president."); *Matus v. Lorain Cnty. Gen. Health Dist.*, 2016 U.S. Dist. LEXIS 5401, at *40 (N.D. Ohio Jan. 15, 2016) ("There is support for the idea that a claim for relief may be brought where an individual has been retaliated against for protected speech of a third person.").

In 2011, the U.S. Supreme Court decided *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170 (2011), a case in which the plaintiff argued that his employer violated the anti-retaliation

provisions of Title VII, when it fired him after another employee—his fiancé—filed an EEOC charge. *Id.* at 172-73. The *Thompson* Court concluded that Title VII prohibits certain third party reprisals, which included in that instance the firing of a plaintiff in retaliation for the fiancé's EEOC filing, on the basis that "a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired." *Id.* at 868. The Supreme Court acknowledged that "line-drawing" problems could arise when applying these principles to third-party reprisal claims, positing that "[p]erhaps retaliating against an employee by firing his fiancé would dissuade the employee from engaging in protected activity, but what about firing an employee's girlfriend, close friend, or trusted co-worker?" *Id.* The Court declined to generalize, but noted that, in the context of Title VII retaliation, "firing a close family member" would likely meet the standard but "inflicting a milder reprisal on a mere acquaintance will almost never do so." *Id.*

In *Montone*, 709 F.3d at 197, the Third Circuit considered a case in which a police officer plaintiff alleged that he suffered retaliation due to another police officer's political activities. The Third Circuit observed that: "No other court of appeals has, to our knowledge, addressed the question presented by this case: whether a plaintiff has standing to bring an action for First Amendment political affiliation retaliation pursuant to § 1983 based on the defendant's alleged deprivation of another's First Amendment rights." *Id.* at 196. The *Montone* Court looked to the reasoning in earlier Title VII cases and noted that although they "involved questions of standing in the context of claims under Title VII, we find the reasoning in those cases persuasive." *Id.* at 197. Comparing Title VII and Section 1983, the Court added that "[i]ndeed, we have similarly relied upon Title VII jurisprudence in resolving questions of first impression related to § 1983 claims because of the 'consonance' of the 'policy considerations' underlying each statute." *Id.* at

198. As noted *supra*, the Third Circuit adopted the reasoning applicable to Title VII in finding that a third party could sue under § 1983 for retaliation for another exercising First Amendment rights. *Id.* at 197.

Based on principles articulated in *Thompson* and extended to Section 1983 in *Montone*, the well-pleaded facts alleging that Jared Kushner's first-degree family members—who own and manage the Kushner Companies—have been effectively "fired" by the pretextual Notice of Default due to his political activities in the Trump Administration are sufficient to make out claims of retaliation for exercise of First Amendment-protected speech and associational rights.

IX. THE CLAIMS AGAINST FULOP ARE NOT BARRED BY THE QUALIFIED IMMUNITY DOCTRINE.

A. The Qualified Immunity Doctrine

The qualified immunity doctrine "shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) ("[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.")). The qualified immunity analysis thus involves a two-part inquiry. First, the court must determine whether the complaint alleges that "a right has been violated." *Williams v. Sec'y Pa. Dep't of Corr.*, 848 F.3d 549, 557 (3d Cir. 2017) ("In assessing qualified immunity claims ... [w]e first determine whether a right has been violated."). If so, then the court "must decide if the right at issue was clearly established when violated such that it would have been clear to a reasonable person that

her conduct was unlawful."[9] *Id.* (citing *Saucier v. Katz*, 533 U.S. 194, 201-02 (2001) ("[I]f a violation could be made out . . . the next, sequential step is to ask whether the right is clearly established."). The allegedly violated right is "clearly established" when, at the time of the challenged conduct, "'the contours of [the] right are sufficiently clear' [such] that every 'reasonable official would have understood that what he is doing violates that right.'" *al-Kidd*, 563 U.S. at 741 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)) (internal alterations omitted). An official that knowingly violates the law cannot avail him or herself of the qualified immunity defense. *Malley v. Briggs*, 475 U.S. 335, 341 (1986) ("[T]he qualified immunity defense . . . provides ample protection to all but the plainly incompetent or those who knowingly violate the law.").

Fulop argues that the constitutional claims asserted in the Fifth through Ninth Counts must be dismissed as against him because he is protected by the qualified immunity doctrine. However, the doctrine does not apply because the Complaint plausibly pleads that Fulop violated Plaintiffs' clearly established constitutional rights, and a reasonable official would have known that his conduct did so under clearly established law.

B. The Complaint Alleges that Fulop Violated Plaintiffs' Constitutional Rights

As discussed in detail throughout this brief, the Complaint adequately pleads that Defendants violated Plaintiffs' well-recognized constitutional rights. Specific as to Fulop, the Complaint's allegations include, but are not limited to, that Fulop:

> Publicly commented that his administration would not support Plaintiffs' application for a tax abatement for the Project in violation of the Redevelopment Agreement, the parties' course of dealing, the City's policies, and Fulop's own Executive Orders, all to curry favor with City residents in advance of the mayoral and City Council elections (Compl. ¶¶ 72-73);

[9] Courts have discretion to decide the two prongs of the qualified immunity analysis in the order they choose. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

Admitted that it was "blatant discrimination" to refuse to provide Plaintiffs with tax abatements for the Project in light of the tax abatements granted to MEPT and other similarly situated developers, the Redeveloper Agreement, and Fulop's own Executive Orders (Compl. ¶ 88);

Admitted that the Project would proceed if the Kushner family was not involved and a new partner was brought in (*id.*);
Publicly stated on multiple occasions that Plaintiffs' application for tax abatements for the Project, which complied with the City's policies for approving same, was "DOA" (Compl. ¶ 92-93);

Failed to act on Plaintiffs' tax abatement application in accordance with Long Term Tax Exemption Law, a requirement that his own Executive Orders acknowledged he was duty-bound to perform (Compl. ¶ 97); and

Caused the Notice of Default, which contained knowingly false statements, to be issued based on political animus towards Plaintiffs and to ingratiate himself to City residents (Compl. ¶¶ 98, 106).

Plaintiffs allege that these actions, taken together, violated several of Plaintiffs' clearly established constitutional rights. With respect to the Fifth and Sixth Counts, Fulop is alleged to have violated Plaintiffs' fundamental right property rights in the Project, including the contractual rights set forth in the Redevelopment Agreement and the property on which the Project is to be developed. *Id.* at ¶¶ 152, 158. Such interests give rise to a fundamental right protected by substantive due process and the equal protection clause. *Nicholas*, 227 F.3d at 141; *DeBlasio*, 53 F.3d at 600 (3d Cir. 1995), *mod. on other gounds*, *UA Theatre Circuit*, 316 F.3d 392; *Enters. v. Pittsburgh Water*, 103 F.3d at 1179 n.12.

In the Seventh Count, Plaintiffs' allege that the foregoing conduct by Fulop violated Plaintiffs' First Amendment right to exercise their free speech by participating in the public discourse by retaliating against them for doing so. Compl. ¶ 167. The Complaint asserts throughout that Fulop's acts were motivated by his political bias against Plaintiffs due to the fact that Jared Kushner, the former CEO of one of the primary investors in Plaintiffs, serves as a senior advisor to President Trump, and that his activities constitute protected political speech.

Id. at ¶¶ 168-70. Plaintiffs' right to participate in public discourse is well-established. *See, e.g.*, *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986).

Fulop's conduct is alleged, in the Eighth Count, to have also violated Plaintiffs' First Amendment right to freely associate. Compl. ¶ 177. Plaintiffs also allege that Fulop deprived Plaintiffs of this right "by engaging in retaliatory action for the exercise of those rights." Compl. ¶ 117. Plaintiffs' fundamental right to freely associate is firmly established. *See, e.g.*, *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000) (citations omitted).

Finally, Plaintiffs allege in the Ninth Count that the issuance of the Notice of Default at Fulop's direction intended to, and did, deprive Plaintiffs of their fundamental property rights in the Project without due process of law in violation of the Fourteenth Amendment. Compl. ¶¶ 183-185. Plaintiffs' constitutional right to use and enjoy their property is well-established. *DeBlasio*, 53 F.3d at 600.

C. The Rights Violated by Fulop Were Clearly Established at the Time of His Conduct, and a Reasonable Official Would Have Known His Conduct Violated Plaintiffs' Rights

As shown above, the rights Plaintiffs seek to enforce were "clearly established" at the time of Fulop's conduct that is alleged to have violated those rights. *Mirabella*, 853 F.3d at 648 (courts look to Supreme Court and Court of Appeals precedent in determining whether a right is "clearly established). In his motion to dismiss, Fulop does not even attempt to attack the firm standing of the constitutional principles set forth above or in the Complaint. Instead, Fulop blatantly mischaracterizes the rights that Plaintiffs seek to enforce as a "Constitutional right to a tax abatement or subsidy." Fulop Br. 9. However, Plaintiffs do not claim a constitutional right to a tax abatement. Rather, as discussed above, Plaintiffs seek to enforce their constitutional rights under the First and Fourteenth Amendments.

Because Plaintiffs' rights were clearly established at the time of Fulop's conduct, his immunity defense fails because "a reasonably competent public official should know the law governing his conduct." *Harlow*, 457 U.S. at 818-19. Indeed, Plaintiffs plead in detail that Fulop knew his efforts to impede Plaintiffs' use of their property was violating their constitutional rights. At a meeting on January 10, 2018, Fulop stated that it would be "blatant discrimination" to refuse to provide the tax abatements to Plaintiffs in light of the tax abatements awarded to MEPT and other similarly situated developers, the Redevelopment agreement, and Fulop's own Executive Orders. Compl. ¶ 88. Fulop also stated during the meeting that it was "really tough" to move forward with the Project with tax abatements with the Kushner family involved, and that the problem would disappear if another partner was brought in on the Project. Compl. ¶ 88. Such a knowing violation of Plaintiffs' constitutional rights takes the qualified immunity defense away from Fulop. *Malley*, 475 U.S. at 341 ("[The qualified immunity defense] provides ample protection to all but the plainly incompetent or those who knowingly violate the law.").

The weaknesses of Fulop's argument is reflected in his reliance on *Liebler v. City of Hoboken*, 2016 U.S. Dist. LEXIS 95641 (D.N.J. July 21, 2016), an unpublished case that actually supports Defendants' position. There, the court denied defendants' motion to dismiss the plaintiff's § 1983 claims for free speech violations, finding that the qualified immunity doctrine could not be said to protect them at the pleading stage. *Id.* at *13-14. Accordingly, Fulop's immunity defense should also be denied here.

X. THE COMPLAINT ADEQUATELY ALLEGES BREACH OF CONTRACT, BREACH OF COOPERATION COVENANT AND BREACH OF COVENANT OF GOOD FAITH CLAIMS AGAINST FULOP AND THE CITY.

The City and Fulop (but not the JCRA) move to dismiss Counts 1 through 3 for breach of contract, breach of cooperation covenant and breach of good faith and fair dealing on the ground

that they did not sign the Redevelopment Agreement and therefore are not parties to the contract. (City Br. 24-27; Fulop Br. 16-17.) While it is true that only the JCRA executed the Redevelopment Agreement, the JCRA at all relevant times acted as an agent of the City in the execution, amendment and performance of the Redevelopment Agreement. The City can therefore be held liable for breach.[10]

The Redevelopment Agreement creates various obligations on Defendants, including, but not limited to, cooperation and support for Plaintiffs' obtaining various government approvals and financing. For example, § 3.01 of the Redevelopment Agreement requires Defendants to "assist the Redeveloper in the preparation and prosecution of any applications for Governmental Approvals required for the Project as well as in the processing of applications to Financial Institutions for financing the Project." Compl. ¶ 36. Under section 4.02, Defendants are obligated to "cooperate in the processing of governmental and quasi-governmental funding applications from sources other than Financial Institutions for financing any part of the Project." Compl. ¶ 41. Such financing included, but was not limited to "long term tax exemptions from the City for the Project" and "Redevelopment Area Bonds from the City and the Local Finance Board. . . ." Compl. ¶ 40. Defendants, however, failed to perform these obligations.

The Complaint alleges that Defendants breached the Redevelopment Agreement by, among other things: (1) issuing a frivolous Notice of Default; (2) failing to adjust the construction timetable after making oral representations and agreements that they would do so; (3) failing to facilitate financing for the Project; and (4) actively interfering with Project financing by making public statements indicating the Plaintiffs had not performed in accordance with the Redevelopment Agreement. Compl. ¶¶ 26, 98-118.

[10] Plaintiffs are not pursuing claims for breach of contract, breach of cooperation covenant, or breach of good faith and fair dealing against Fulop.

Despite Defendants' impediments, Plaintiffs have done everything in their power to perform under the Redevelopment Agreement. For example, Plaintiffs recently obtained Government Approvals despite several site planning delays due to requirements by the Port Authority and FAA. Compl. ¶¶ 47, 54. Plaintiffs also entered into a Pledge Agreement and contributed approximately $2.5 million as required by § 2.18 of the Redevelopment Agreement. Compl., Exh. A at § 2.18.

Tellingly, the JCRA does not contest the breach of contract claim in its motion to dismiss. Therefore, by the JCRA's own admission, the Complaint sets forth the basis for a viable contract claim. The elements of breach are therefore not reasonably in dispute at this stage of the litigation based upon the well-pled allegations in Plaintiffs' Complaint.

The only remaining issue on this motion is therefore whether the City and Fulop can be held liable for breach of a contract signed by the JCRA. The JCRA is indisputably an agent and instrumentality of the City. Indeed, the Redevelopment Agreement makes clear that the JCRA was acting as "an instrumentality of the City of Jersey City" for purposes of the Redevelopment Agreement and performance thereunder. (Compl. ¶ 33, Exh. A at 1.) The JCRA derives its statutory authority from the Local Redevelopment and Housing Law, N.J.S.A. § 40A:12A-1, *et seq*. That law, however, provides that the municipality remains ultimately responsible for redevelopment projects:

> The municipality shall be responsible for implementing redevelopment plans and carrying out redevelopment projects… The municipality may execute these responsibilities directly, or in addition thereto or in lieu thereof, through either a municipal redevelopment agency, or a municipal housing authority authorized to exercise redevelopment powers…

N.J.S.A. § 40A:12A-4(c). The City therefore acts through the JCRA when the JCRA executes a contract.

This interpretation is supported by the case law. In fact, the New Jersey Appellate Division recently noted this relationship with respect to a breach of contract action involving the same Loew's Theater that Plaintiffs here were required to fund under the Redevelopment Agreement:

> In 1993 the City purchased the theater. Acting through the Jersey City Redevelopment Agency (JCRA), the City spent its own funds, plus monies obtained from the New Jersey Historic Trust, to stabilize the building and make it available for special events.

Friends of the Loew's v. City of Jersey City, 2017 N.J. Super. Unpub. LEXIS 996 (App. Div. Apr. 24, 2017). In the *Loew's* case, the plaintiff had entered into a contract with the City. *Id.* at *2. The suit alleged breach of contract against both the City and the JCRA, to which both entities answered and filed counterclaims for breach, among other things. *Id.*

Defendants' reliance on *Candeliere v. United States*, 816 F. Supp. 994, 1001 (D.N.J. 1992), is misplaced. (City Br. at 25.) *Candeliere* is premised upon statutory law that has since been repealed when the Redevelopment Agencies Law, N.J.S.A. § 40:55C-1, *et seq.*, was replaced in 1992 by the Local Redevelopment and Housing Law, N.J.S.A. § 40A:12A-1, *et seq.* In any event, the *Candeliere* Court observed that the City has the power to act as a redevelopment authority in the context of a settlement agreement with a property owner over a relocation claim as part of redevelopment project. *Id.* at 1001 ("Acting as the Redevelopment Agency, therefore, the City Council has the power to settle law suits on behalf of the City.") There, the City of Orange conducted redevelopment activity through its city council, which was acting as a redevelopment agency. *Id.* at 1002. Here, by contrast, it is the JCRA sitting as an "instrumentality" of the City as expressly set forth in the first paragraph of the Redevelopment Agreement pursuant to the Local Redevelopment and Housing Law. The JCRA therefore is alleged to be acting as the City's agent for all purposes in relation to the Redevelopment

Agreement – including its execution and subsequent breach. As such, the Complaint asserts a viable claim at this early stage of the litigation against the City for breach of the Redevelopment Agreement signed by the JCRA.

The City further contends that it cannot be held liable for breach of contract because Plaintiffs breached the contract first by failing to commence construction by January 1, 2017. City Br. at 25-26. The Complaint concedes no such thing and, tellingly, the JCRA does not expressly make this argument.

While it is undisputed that construction did not begin by the commencement date, it is equally indisputable that the time period for JSP to satisfy the Redeveloper Contingencies in § 4.01(b) has not yet expired. The Initial Contingency Period runs 180 days from "non-appealable Preliminary and Final Major site plan approval," and the appeal period runs 45 days from the date of the Final Planning Board Approval on February 20, 2018, *i.e.*, until April 6, 2018. The Initial Contingency Period is subject to a further extension of ninety business days pursuant to § 4.01(b) of the Redevelopment Agreement. Accounting for these built-in extensions, the Initial Contingency Period expires, at the earliest, on February 14, 2019. Accordingly, Plaintiffs were not in breach at the time of the Notice of Default and still are not in breach of the Redevelopment Agreement even today. Compl. ¶ 48. Therefore, the City's (and JCRA's) breach is not excused by any purported breach by Plaintiffs.

XI. THE COMPLAINT ALLEGES A VIABLE PROMISSORY ESTOPPEL CLAIM AGAINST THE FULOP AND THE CITY.

Defendants Fulop and the City both move to dismiss JSP's promissory estoppel claim (Count 4) asserting that neither signed the Redevelopment Agreement.[11] Fulop Br. 15-16; City Br. 28-29. The City additionally seeks dismissal on the ground that no clear and definite

[11] The JCRA did not move to dismiss JSP's promissory estoppel claim, so this count will remain in the case regardless of the outcome of this motion.

promises were made. City Br. at 29. Neither of these arguments have merit. First, Promissory estoppel is a quasi-contract theory so neither the City nor Fulop need be a party to a written contract in order to be found liable. Second, the complaint alleges promises sufficiently clear and definite to maintain a claim at this stage of the case. In any event, recent case law favors a relaxing of the "clear and definite" requirement for promissory estoppel claims.

In New Jersey, a viable claim for promissory estoppel requires: "(1) a clear and definite promise by the promisor; (2) the promise must be made with the expectation that the promisee will rely thereon; (3) the promisee must in fact reasonably rely on the promise[;] and (4) detriment of a definite and substantial nature must be incurred in reliance on the promise." *Kelly v. Simon Prop. Grp., Inc.*, 2010 WL 4292018, at *7 (D.N.J. Oct. 21, 2010); *Watson v. City of Salem*, 934 F. Supp. 643, 661 (D.N.J. 1995).

The seminal case in this State setting forth the modern law of promissory estoppel is the Appellate Division's decision in *Pop's Cones, Inc. v. Resorts Intern. Hotel, Inc.*, 307 N.J. Super. 461 (App. Div. 1998). The *Pop's Cones* case negates both of the City's legal arguments that the City is required to be a party to the Redevelopment Agreement and that there was not a "clear and definite" promise made by the City (or Fulop) here. (*See* City Br. at 29.) As noted by the court in *Pop's Cones*:

> Although earlier New Jersey decisions discussing promissory estoppel seem to greatly scrutinize a party's proofs regarding an alleged "clear and definite promise by the promisor," ... more recent decisions have tended to relax the strict adherence to the *Malaker* formula for determining whether a prima facie case of promissory estoppel exists.
>
> ***
>
> Plaintiff's complaint neither seeks enforcement of the lease ... Plaintiff merely seeks to recoup damages it incurred ... in reasonably relying to its detriment upon defendant's promise. Affording plaintiff all favorable inferences, its equitable claim raised a jury question. Plaintiff's complaint, therefore, should not have been summarily dismissed.

Pop's Cones, 307 N.J. Super. at 469-470 (internal citations omitted).

Thus, the Appellate Division's decision in *Pop's Cones* make clear that: (1) the defendant need not be a party to a contract to incur liability for promissory estoppel; (2) "even in the absence of a clear and definite contract …, the plaintiff [may] proceed with a cause of action for damages flowing from plaintiff's losses based on her detrimental reliance on the promise"; and (3) "when a plaintiff relied to its detriment on defendant's assurances … the facts clearly at least raise a jury question." *Ibid.*

Under the doctrine of promissory estoppel, reliance is reasonable if the actions taken are necessary for the deal to be consummated. *Pop's Cones*, 307 N.J. Super., at 472 ("**even in the absence of a clear and definite contract** . . . , the plaintiff [may] proceed with a cause of action for damages flowing from plaintiff's losses based on her detrimental reliance on the promise") (emphasis added). Under the relaxed standard established in *Pop's Cones*, the actions alleged by Plaintiffs here are more than sufficient to establish their promissory estoppel claims.

Here, the Complaint satisfies its burden of alleging each of these elements against Fulop and the City. For example, the Complaint alleges that in "April 2015, Defendants made promises to JSP that they would cooperate with JSP in its efforts to develop the Project and would not unreasonably withhold consent to adjustments of the time periods for obtaining Government Approvals, financing and commencement of construction." Compl. ¶ 147. The Complaint further alleges that "Defendants repeatedly assured JSP not to be concerned about the January 1, 2017 date." Compl. ¶ 149. The Complaint details that Defendants made the following specific promises in order to induce JSP to take over the project from MEPT in 2015:

> A. That, given the complexity of the Project and the number of issues and problems that could occur in the course of development, Defendants would work in good faith with JSP to adjust the timetable for completion of construction in a reasonable way;

> B. That Defendants would cooperate with and assist JSP in obtaining required Governmental Approvals;
>
> C. That Defendants would cooperate with and assist JSP in obtaining financing for the Project;
>
> D. That the Project was in substance a public/private venture and it required cooperation by both sides to achieve the goal of constructing the massive improvements contemplated to revitalize the Journal Square area;
>
> E. That the Project had received, and the City had issued, tax abatements to the Prior Redeveloper and for other projects in the Journal Square area, and that Defendants would cooperate with and assist JSP in obtaining the similar non-governmental financing needed for the Project, including tax abatements from the City

Compl. ¶ 30.

The Complaint also alleges that in 2017 "JSP was advised by City officials that 'it's not a good time' for them to deal with the tax abatement application and requested that JSP hold the application back until the elections were over in November." Compl. ¶ 74. It is further alleged that "Deputy Mayor Marcos Vigil advised JSP that, for political reasons, JSP should submit its application for tax abatements by April or May or should wait until after the elections for mayor and the City Council were held in November." Compl. ¶ 69. JSP acquiesced to the City's request because JSP understood from its various discussions with City officials that the application would be "handled fairly and approved." Compl. ¶ 74.

JSP also sufficiently pleads the remaining elements that it reasonably relied upon these promises to its detriment. Specifically, the Complaint states that in reliance upon these promises, JSP "executed a Pledge Agreement, pursuant to which JSP was required to contribute $2.5 million to the renovation of the Loew's Theatre in Journal Square" and that the "payment consisted of a $500,000 non-refundable cash contribution and a $2 million irrevocable letter of credit payable to the JCRA." Compl. ¶ 49.

Later, in 2017, in further reliance on these promises, the Complaint alleges that JSP executed an Amended and Restated Pledge Agreement at the City's request "evidencing their dealings and understanding that the January 1, 2017 date for the commencement of construction of the Project was to be extended." Compl. ¶ 79. The Complaint alleges that "This change provided the City with more flexibility in how to utilize those funds, which had already been transferred by JSP by March 2016." Compl. ¶ 79. These allegations are more than sufficient to sustain JSP's promissory estoppel claim at this early stage of the litigation. *See generally, K. Hovnanian Cos. Northeast, Inc. v. County of Essex,* 2005 U.S. Dist. LEXIS 21665 at *19 (App. Div. Aug. 6, 2009) (reversing dismissal of tortious interference claim by plaintiff developer against government defendant for representations made regarding property).

As demonstrated above, a plain reading of this Complaint shows that Defendants made clear promises to support JSP's requests for tax abatements and reasonable accommodations on the construction timeline given Fulop's request for JSP to withdraw its application pending his own re-election campaign and the various delays in obtaining the requisite planning board approvals. JSP reasonably relied on these promises to its substantial detriment by contributing $2.5 million to the Loew's Theatre, subsequently amending that contribution to provide the City with more flexibility to spend that money, and then investing approximately $55 million in various development and construction costs. Accordingly, Fulop's and the City's motion to dismiss the promissory estoppel claim in Count 4 should be denied.

XII. THE COMPLAINT ALLEGES VIABLE TORTIOUS INTERFERENCE CLAIMS AGAINST FULOP AND THE CITY.

On Count 10 (tortious interference with contract) and Count 11 (tortious interference with prospective business advantage), Fulop and the City wrongly seek findings regarding contested facts, including: (1) the existence of malice; and (2) immunity under the Tort Claims Act, which

involve fact-intensive balancing tests that are wholly improper on motion based solely upon the face of the Complaint. *See* Fulop Br. 17-18; City Br. 29. Their motions must fail.[12]

A tortious interference claim requires: (1) that plaintiff had either a contract or "a reasonable expectation of an economic advantage [(2)] that was lost as a direct result of defendants' malicious interference; and [(3)] that it suffered losses thereby." *See Lamorte Burns & Co. v. Walters*, 167 N.J. 285, 306 (2001). As to the substance of the claim, Defendants challenge solely the element of "malice." Under New Jersey law, 'malice' "is defined to mean that the harm was inflicted intentionally and without justification or excuse." *Printing Mart-Morristown v. Sharp Elecs. Corp.*, 116 N.J. 739, 751 (1989). Such conduct is actionably malicious if not "sanctioned by the 'rules of the game.'" *Lamorte Burns & Co. v. Walters*, 167 N.J. 285, 306 (2001). There is a fact-intensive, multifactor "balancing test for courts to apply in evaluating whether an act of interference is improper." *Nostrame v. Santiago*, 213 N.J. 109, 122 (2013) (citing Restatement (Second) of Torts §§766, 766B, 768). Accordingly, New Jersey Courts have repeatedly held that the issue of "malice" is fundamentally a fact-driven issue for a jury, certainly not as a matter of law on a motion to dismiss. *Lesile Blau Co. v. Alfieri*, 157 N.J. Super. 173, 187 (App. Div. 1978) (finding questions of common morality "for the jury or the fact finder to decide the issue."); *Ass'n Grp. Life, Inc. v. Catholic War Veterans*, 120 N.J. Super. 85, 99 (App. Div. 1971) ("A jury might reasonably find that the way in which [defendant acted] was not consonant with good business morality").

At the pleading stage, "Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b). Plaintiffs plead far more than what is required to survive dismissal, describing in detail the facts establishing Fulop's malice. Plaintiffs

[12] The JCRA has also moved to dismiss both tortious interference counts. Given that the JCRA admits that it is a party to the Redevelopment Agreement and is not moving to dismiss the breach of contract counts, Plaintiffs are not asserting tortious interference counts 10 or 11 against the JCRA.

plead that Fulop: acted to compel JCRA to terminate Plaintiffs' Redevelopment Agreement; sabotaged Plaintiffs' financing; and obstructed construction of the Premises, not based upon any legitimate justification, but to intentionally harm Plaintiffs for political gain. Compl. ¶¶ 2, 153. When challenged, Fulop acknowledged that so long as Kushner was involved the Project was "DOA," and he would only allow the Project to move forward if it was transferred. Compl. ¶¶ 89, 93. *See also* Compl. ¶¶ 1, 106, 107, 115, 119, 121, 191. New Jersey Courts hold that a claim for malicious interference exists where—as here—a defendant falsely, and for improper purposes, represents to the public that plaintiff has failed to perform under a contract. *See Dimaria Const., Inc. v. Interarch*, 351 N.J. Super. 558, 567 *aff'd*, 172 N.J. 182 (2002) (affirming jury verdict of malicious interference without justification or excuse where defendant publicly claimed plaintiff contractor failed to meet deadline, violating automatic extension, in an attempt to blame plaintiff for project delays, which resulted in plaintiff's inability to obtain financing); *Buono Sales, Inc. v. Chrysler Motors Corp.*, 363 F.2d 43, 49 (3d Cir. 1966) (*en banc*) (reversing summary judgment, applying New Jersey law, and holding defendant's false claim that plaintiff did not provide "genuine factory" service sufficient to establish malice). In response, Defendant Fulop claims that the facts pled in the Complaint regarding his intent are false, and that he purportedly acted "in the best interest of Jersey City." Fulop Br. 9. But such factual arguments are wholly improper at the motion to dismiss stage. *See Dimaria Const.*, 351 N.J. Super. at 567 (finding defendant's defense of proper motive was a jury question); *Fid. Eatontown, LLC v. Excellency Enter., LLC*, 2017 U.S. Dist. LEXIS 96368, at *20 (D.N.J. June 22, 2017) (denying motion to dismiss because allegation that defendant mounted bad faith challenges to delay plaintiff's project stated malice); *Graco, Inc. v. PMC Glob., Inc.*, 2009 U.S. Dist. LEXIS 26845,

at *67 (D.N.J. Mar. 31, 2009) (denying motion to dismiss tortious interference claim based on malice).

Next, Defendants Fulop and the City claim immunity based upon the Tort Claims Act, arguing that Fulop's decision was purportedly "discretionary." As a threshold matter, Defendants cannot raise an affirmative defense based on factual allegations outside the Complaint on a motion to dismiss. A claim of "immunity under the State Tort Claims Act is regarded as an affirmative defense." *Charpentier v. Godsil*, 937 F.2d 859, 863 (3d Cir. 1991). On a motion to dismiss pursuant to Rule 12(b)(6), the Court evaluates only "the allegations contained in the complaint itself [and] also the exhibits attached to it which the complaint incorporates." *ALA, Inc. v. CCAIR, Inc.*, 29 F.3d 855, 859 (3d Cir. 1994). Such a motion based upon an affirmative defense must be rejected unless the "affirmative defense like the statute of frauds appears on [the] face" of the Complaint. *Id.* Here, Fulop readily admits that the defense of immunity is not found on the face of the Complaint: "[t]here are simply no facts alleging that Mayor Fulop was acting contrary to his duties as an official." Fulop Br. at 18. On that ground alone, the Court should deny Defendant's motion without considering the merits.

Turning to the substance of Defendants' argument, Fulop seeks dismissal arguing immunity under the Tort Claims Act for "discretionary activities." The statute provides:

> d. A public employee is not liable for the exercise of discretion when, in the face of competing demands, he determines whether and how to utilize or apply existing resources, including those allocated for equipment, facilities and personnel unless a court concludes that the determination of the public employee was palpably unreasonable; . . .
>
> Nothing in this section shall exonerate a public employee for negligence arising out of his acts or omissions in carrying out his ministerial functions.

N.J.S.A. § 59:3-2. An act is not 'discretionary,' "if the act must be done a prescribed manner in obedience to the mandate of legal authority, without regard to or the exercise of his [or her] own judgment upon the propriety of the act being done." *Morey v. Palmer*, 232 N.J. Super. 144, 151 (App. Div. 1989) (quoting Black's Law Dictionary, 1148 (4th ed. 1968)). In other words, there is no immunity regarding "ministerial acts which defendants were mandated to perform." *Henebema v. S. Jersey Transp. Auth.*, 430 N.J. Super. 485, 499 (App. Div. 2013). Here, Fulop was mandated to extend the deadlines for the Project by the contractual commitment to confer a 180-day automatic mandatory extensions, Compl. ¶ 48, and to provide further extensions which "shall not be unreasonably denied, delayed or withheld." (Compl. ¶ 42, Exh. A at § 2.10, Schedule C-1.) He was without any discretion to procure a baseless declaration of default against Plaintiffs. Similarly, the law mandated that Fulop accept Plaintiffs' tax abatement application and submit "recommendations to the municipal governing body" within "60 days of his receipt of the application." N.J.S.A. § 40A:20-8. Defendant Fulop was without discretion to indefinitely withhold any recommendation from the Council in order to circumvent a final decision on the merits of Plaintiffs' application. Accordingly, the Complaint pleads a "mandate of legal authority, without regard to or the exercise of [Fulop's] own judgment upon the propriety of the act being done," rendering the approval a ministerial act without any immunity.[13]

Fulop also omits any mention of the explicit exception to immunity for wrongful acts.

> Nothing in this act shall exonerate a public employee from liability if it is established that his conduct was outside the scope of his employment or constituted a crime, actual fraud, actual malice or willful misconduct.

N.J.S.A. § 59:3-14. "Willful misconduct is the commission of a forbidden act with actual (not imputed) knowledge that the act is forbidden." *PBA Local No. 38 v. Woodbridge Police Dept.*,

[13] Examining only the face of the Complaint, Defendants cannot meet the element of immunity as a matter of law that Fulop's decisions were not "palpably unreasonable." N.J.S.A. § 59:3-2.

832 F. Supp. 808, 830 (D.N.J. 1993). Success on Plaintiffs' claim of tortious interference, that Fulop maliciously interfered with the Redevelopment Agreement without justification or excuse, squarely falls within the exception to immunity. For this reason, Courts routinely reject New Jersey Tort Claims Act challenges to tortious interference claims at this early stage. *See Van v. Borough of N. Haledon*, No. 05-5595 , 2009 U.S. Dist. LEXIS 52221, at *27-28 (D.N.J. June 17, 2009) (denying Tort Claims Act motion because "actual malice is an element of the cause of action [tortious interference], thereby putting it at odds with the good faith immunity provisions of the TCA."). Taking the allegations of the Complaint as true for the purposes of this motion to dismiss, Defendant cannot establish as a matter of law that Fulop's actions were both discretionary and fall outside the exception to immunity for malicious acts. Their motions should be denied.

CONCLUSION

As set forth in Plaintiffs' Complaint and for the foregoing reasons, Defendants' motions to dismiss should be denied in their entirety.

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